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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY LAYNE ROGERS, SR.,
Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections, State of Florida,

BRADLEY D. CARTER,
Warden, Union Correctional Institution, Raiford, Florida,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Jerrel E. Phillips
P.O. Box 14463
Tallahassee, FL 32317
(850) 877-8660

John G. Buchanan III
Timothy C. Hester*
Mark E. Porada
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000
* Counsel of Record
Attorneys for Petitioner

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70 pp

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred as a matter of law in denying Petitioner's habeas corpus petition alleging ineffective assistance of appellate counsel when it failed to assess counsel's performance under the legal standards in effect at the time of Petitioner's direct appeal.

2. Whether the Eleventh Circuit erred as a matter of law in denying Petitioners' claim of ineffective assistance of appellate counsel where counsel failed to raise an obvious claim of reversible error on direct appeal.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The caption to this case contains the names of all parties to this proceeding, both here and before the United States Court of Appeals for the Eleventh Circuit. No corporations or parent corporations are involved in this matter.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS & RULES 1

STATEMENT OF THE CASE 4

I. FACTS AT TRIAL 4

II. FACTS OF THE DIRECT APPEAL 7

III. THE STATE POST-CONVICTION PROCEEDING 9

IV. THE FEDERAL HABEAS CORPUS PROCEEDING 10

REASONS FOR GRANTING THE WRIT 12

I. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE. 12

II. THE ELEVENTH CIRCUIT'S DECISION IGNORES THE LEGAL STANDARDS IN EFFECT AS OF THE TIME OF ROGERS'S DIRECT APPEAL AND CONTRAVENES THIS COURT'S PRECEDENT. 13

A. Courts Are Required to Assess Counsel's Performance by the Standards in Effect as of the Time of the Challenged Conduct. ...13

B. Florida Law in Effect as of the Time of Rogers's Direct Appeal Universally Required Reversal Based on a Trial Court's Failure to Renew the Offer of Counsel.....14
C. The Trial Court Never Renewed the Offer of Counsel to Rogers.....21

CONCLUSION.....23

TABLE OF AUTHORITIES

Federal Cases

Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997).....21
Evitts v. Lucey, 469 U.S. 387 (1985).....4
Faretta v. California, 422 U.S. 806 (1975).....9
Freeman v. Lane, 962 F.2d 1252 (7th Cir. 1992).....21
Jackson v. Leonardo, 162 F.3d 81 (2d Cir. 1998).....20
Mapes v. Coyle, 171 F.3d 408 (6th Cir.), *cert. denied*, 120 S. Ct. 369 (1999).....20
Matire v. Wainwright, 811 F.2d 1430, 1438-39 (11th Cir. 1987).....21
Orazio v. Dugger, 876 F.2d 1508, 1510 (11th Cir. 1989).....21
Pelmer v. White, 877 F.2d 1518 (11th Cir. 1989).....13
Roe v. Flores-Ortega, 120 S. Ct. 1029 (2000).....13
Strickland v. Washington, 466 U.S. 668 (1984).....4, 13, 19
United States v. Cook, 45 F.3d 388 (10th Cir. 1995).....21

State Cases

Allied Fidelity Ins. Co. v. State, 415 So. 2d 109 (Fla. Dist. Ct. App. 1982).....14
Baranko v. State, 406 So. 2d 1271 (Fla. Dist. Ct. App. 1981) (per curiam).....17
Beard v. State, 751 So. 2d 61 (Fla. Dist. Ct. App. 1999).....20
Billions v. State, 399 So. 2d 1086 (Fla. Dist. Ct. App. 1981).....14, 16
Brown v. State, 479 So. 2d 152 (Fla. Dist. Ct. App. 1985)...19
Chandler v. State, 442 So. 2d 171 (Fla. 1983).....8
Clark v. State, 442 So. 2d 1044 (Fla. Dist. Ct. App. 1983).....17
Cooper v. State, 576 So. 2d 1379 (Fla. Dist. Ct. App. 1991) .18
Felton v. State, 438 So. 2d 1049 (Fla. Dist. Ct. App. 1983) .17

Gurchick v. State, 439 So. 2d 1002 (Fla. Dist. Ct. App. 1983) 18
Harrell v. State, 486 So. 2d 7 (Fla. Dist. Ct. App. 1986) (per curiam).....20
Hayes v State, 566 So 2d 340 (Fla. Dist. Ct. App. 1990).....19
James v. State, 428 So. 2d 706 (Fla. Dist. Ct. App. 1983) 17
Jones v. State, 650 So. 2d 1095 (Fla. Dist. Ct. App. 1995) ..15, ...16, 18
Mincey v. State, 684 So. 2d 236 (Fla. Dist. Ct. App. 1996) .20
Morgan v. State, 504 So 2d 504 (Fla. Dist. Ct. App. 1987) .19
Norman v. State, 699 So. 2d 854 (Fla. Dist. Ct. App. 1997) 20
Parker v. State, 539 So. 2d 1168 (Fla. Dist. Ct. App. 1989) .19
Rogers v. State, 511 So. 2d 526 (Fla. 1987), *reversed*, Case No. 91,044 (Fla. Feb. 15, 2001).....5
S. R. v. State, 346 So. 2d 1018 (Fla. 1977).....14
Sanderson v. State, 447 So. 2d 374 (Fla. Dist. Ct. App. 1984), *approved in part, quashed in part*, 469 So. 2d 1383 (Fla. 1985) 18
Sayers v. State, 423 So. 2d 985 (Fla. Dist. Ct. App. 1982) (per curiam).....17
Sproule v. State, 719 So. 2d 349 (Fla. Dist. Ct. App. 1998) .18
State v. Roberts, 677 So. 2d 264 (Fla. 1996).....19
Traylor v. State, 596 So.2d 957 (Fla. 1992).....14

Constitutional Provisions

U.S. Const. amend. 6 1
U.S. Const. amend. 14 2

Statutes

28 U.S.C. § 1254.....1
28 U.S.C. § 2254.....2

Rules

S. Ct. R. 10.....13
Fla. R. Crim. P. 3.111 ..... passim

OPINIONS BELOW

The mandate of the court of appeals (App. A1-A2) and the decisions of the court of appeals denying Petitioner's appeal (App. A5-A14) and motion for rehearing (App. A3-A4) are unreported. The decision of the district court denying Petitioner's petition for writ of habeas corpus (App. A23-A29) is unreported.

JURISDICTION

The decision of the court of appeals was entered on October 12, 2000. A timely motion for reconsideration was denied on November 27, 2000. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES & RULES INVOLVED

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

> have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. § 2254(d) provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Florida Rule of Criminal Procedure 3.111(d)(5) provides:

> If a waiver [of counsel] is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

STATEMENT OF THE CASE

This case has important implications for the lower federal courts' application of a defendant's Sixth Amendment right to the effective assistance of counsel on direct appeal, as established by this Court's decisions in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Evitts v. Lucey*, 469 U.S. 387 (1985). Contrary to this Court's directive in *Strickland* that courts must assess counsel's effectiveness by the legal standards in effect at the time of counsel's conduct, the court of appeals in this case analyzed the constitutionality of counsel's performance on direct appeal solely by reference to two state court cases decided many years after the direct appeal. In so doing, the court of appeals disregarded the clear requirement that the constitutionality of counsel's performance must be judged under the law in effect as of the time of counsel's actions. That result unfairly and unconstitutionally restricts a defendant's Sixth Amendment right to the effective assistance of counsel and is directly contrary to this Court's holding in *Strickland*. Accordingly, review by this Court is warranted.

I. FACTS AT TRIAL

On April 12, 1982, Rogers was arrested and charged with two counts of armed robbery in connection with the robbery of a Publix store in Orange County, Florida.[1] He was ultimately tried and convicted on both counts, and was sentenced to two twenty-year terms.

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[1] Because money was taken from two people during a single incident at the Publix store, Rogers was charged with two separate armed robberies.

These convictions were later used as substantive evidence of guilt in a murder prosecution that resulted in Rogers's being sentenced to death. *See Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *reversed*, Case No. 91,044 (Fla. Feb. 15, 2001).[2]

In pretrial proceedings in the fall of 1982 and the spring of 1983, Rogers was declared indigent and was provided with court-appointed counsel. On August 22, 1983 -- the day before trial -- Rogers informed the trial court that he wanted to represent himself. Rogers explained that he was dissatisfied with his appointed lawyer, in particular because the lawyer had failed to confer with a single witness even though trial was scheduled to begin the next day.

The trial court then conducted an abbreviated colloquy with Rogers, Charles Tabscott (Rogers's appointed lawyer), and the prosecutor. The court granted Tabscott's motion to withdraw and permitted Rogers to proceed *pro se*. However, the court asked Tabscott "to remain available in an advisory capacity." Three days into the trial, on August 25, 1983, the court granted a mistrial. A new trial was scheduled

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[2] The key witness against Rogers in the Publix trial was a disgruntled former employee and convicted felon on probation, Thomas McDermid, who had implicated Rogers in a series of robberies, and later a murder, in exchange for a highly favorable plea bargain that included immunity from prosecution for that murder. The Florida Supreme Court recently reversed Rogers's 1984 murder conviction based on evidence withheld from the defense that, among other things, would have directly impeached McDermid's credibility. *Rogers v. State*, Case No. 91,044 (Fla. Feb. 15, 2001).

to begin on September 26, 1983. On that morning, the trial court reversed its prior evidentiary ruling and held that the State would be permitted to introduce evidence of two other armed robberies as proof of Rogers's guilt on the Publix robberies. It based its ruling on Florida's so-called *"Williams* Rule," which in certain circumstances permits the use of prior criminal acts as substantive evidence of guilt. *See Williams v. State*, 110 So. 2d 654 (Fla. 1959).

In response to the trial court's reversal of this key evidentiary ruling, Rogers requested and was granted a one-month continuance. Although the trial court noted that "the defense posture ha[d] changed" as a result of its evidentiary ruling, it did not renew the offer of counsel. Rogers was never told that he could revoke his prior waiver of counsel now that his defense had become vastly more difficult.

The second Publix trial began on October 31, 1983. Rogers again represented himself. The trial court never renewed the offer of counsel at any time either before or during the second trial. In fact, the trial court never told Rogers that, despite his waiver of counsel, he could later change his mind and choose to be represented by counsel. To the contrary, midway through the second trial, in response to concerns that Rogers expressed about the difficulties of securing discovery and other records, the trial court made the following remarks:

> You're representing yourself and you made that decision to represent yourself, and then you say, "Well, golly, gee, I have so much difficulty

> getting all this done." Well, so what. You take your choice, I guess. . . . I mean, Mr. Rogers has undertaken to represent himself. And he goes by the same rules.

As reflected in the August 1983 hearing when Rogers was permitted to proceed *pro se*, the trial court instructed Rogers's court-appointed lawyer, Charles Tabscott, "to remain available in an advisory capacity" though he "would not be responsible for the conduct of trial." Tabscott served in that restricted role in both the first and second Publix trials. Rogers conducted voir dire and the direct and cross-examination of every witness in both trials. He presented opening statements in both trials, and closing argument in the second (there was none in the first). He conducted the direct and cross-examination of every witness at both trials. After conviction in the second trial, he argued his case at sentencing. In short, as instructed, Tabscott served only in an "advisory capacity" while Rogers conducted the defense.

II. FACTS OF THE DIRECT APPEAL

Counsel from the public defender's office was appointed to represent Rogers on direct appeal. Rogers's appellate lawyer raised a total of seven claims on direct appeal, in a brief that was 24 pages long (with just 18 pages of argument). No reply brief was filed.

Of the seven claims raised on direct appeal, one raised a challenge to Rogers's sentence that, even if successful, would not have affected his conviction. The remaining six claims challenged evidentiary and other

discretionary rulings that were subject to reversal only under the exacting standard of abuse of discretion.[3] Appellate counsel's primary argument, that the trial court committed an abuse of discretion in admitting other-crimes evidence under the *Williams* Rule, failed even to discuss the main case on which the trial court had relied in admitting evidence of other crimes.[4]

Despite raising seven claims, the appeal brief omitted any claim under Fla. R. Crim. P. 3.111 -- the rule of Florida procedure requiring that "the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel." (Emphasis added.) Indeed, the fact that Rogers proceeded *pro se* was barely mentioned in the brief.

On January 4, 1985, the Florida Fifth District Court of Appeal affirmed Rogers's convictions and sentences without written opinion.

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[3] The six discretionary issues raised by appellate counsel were based on the trial court's: (1) admission of evidence of other crimes under the *Williams* Rule; (2) denial of a motion to appoint an expert witness; (3) denial of a continuance; (4) failure to replace a juror; (5) restriction of the cross-examination of a witness; and (6) denial of a motion for mistrial in the midst of trial.

[4] The case was *Chandler v. State*, 442 So. 2d 171 (Fla. 1983). It was the central basis for the trial court's *Williams* Rule order. Remarkably, *Chandler* was not cited in Rogers's appeal brief.

III. THE STATE POST-CONVICTION PROCEEDING

On November 6, 1995, Rogers filed an original petition for writ of habeas corpus in the Florida Fifth District Court of Appeal. There Rogers raised the claim presented here, that he was denied his right to the effective assistance of appellate counsel because his appointed counsel on direct appeal failed to raise an obvious claim of reversible error under Florida law -- the trial court's failure to renew the offer of counsel at any subsequent stage of the proceedings, as required under Fla. R. Crim. P. 3.111.[5]

On December 21, 1995, the State moved to dismiss the original habeas petition on the grounds that it was untimely and procedurally barred. In the alternative, the State moved for supplementation of the record to include what it claimed were additional hearings potentially related to Rogers's decision to represent himself at trial. On February 2, 1996, the Fifth District Court of Appeal denied the State's motion to dismiss on grounds of procedural bar, but granted the State's alternative motion to supplement the record. (App. A38-A39.) By further order dated March 29, 1996, the Court of Appeal granted the State's motion to relinquish jurisdiction to the trial court to permit reconstruction of hearings that it claimed had not been transcribed. (App. A36-A37.)

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[5] Rogers also argued that his appellate counsel was constitutionally ineffective for failing to raise a challenge to his waiver of counsel under *Faretta v. California*, 422 U.S. 806 (1975). That claim is not at issue here.

Following proceedings to supplement the appellate record, the Fifth District Court of Appeal reasserted jurisdiction and the State responded to the substance of the original habeas corpus petition. On August 28, 1996, Fifth District the Court of Appeal denied Rogers's petition without written opinion. (App. A31-A32.) Because the Court of Appeal previously had denied the State's motion to dismiss the petition on grounds of procedural bar, the order denying the petition was necessarily a determination on the merits.

IV. THE FEDERAL HABEAS CORPUS PROCEEDING

On August 24, 1997, Rogers initiated this action by filing a petition for writ of federal habeas corpus in the United States District Court for the Middle District of Florida. Without conducting oral argument or an evidentiary hearing, the district court denied the petition by order dated February 23, 1998. (App. A23-A30.)

Rogers noticed a timely appeal from the district court's denial of the federal habeas corpus petition on March 22, 1999. By Order dated December 1, 1999 (App. A17-A18), as amended December 13, 1999 (App. A15-A16), the court of appeals issued a certificate of appealability on the following two issues:

> Whether appellate counsel was constitutionally ineffective for failing to argue on direct appeal that the trial court did not adequately warn appellant of the dangers

> and disadvantages of representing himself at trial.
>
> Whether appellate counsel was constitutionally ineffective for failing to argue on direct appeal that the trial court did not renew an offer of counsel to appellant at any time after appellant waived his right to counsel.

Following briefing and oral argument on those certified questions, the court of appeals affirmed the district court's denial of the federal habeas corpus petition. (App. A5-A14.) The court of appeals did not dispute that the failure of appellate counsel to raise a claim of reversible error on direct appeal deprives a defendant of his right to the effective assistance of counsel. Likewise, the court of appeals acknowledged that Fla. R. Crim. P. 3.111(d) "requires a trial court to advise a *pro se* defendant at each subsequent stage of the proceedings that he can invoke his right to counsel," but held that "Rogers cannot prevail on this claim because there is no *per se* rule in Florida that a trial court's failure to inform a defendant of his right to counsel at each subsequent stage of the proceedings, as required by Fla. R. Crim. P. 3.111(d) constitutes reversible error." (App. A13.)

In support of its conclusion, the court of appeals did not cite to a single case decided as of the time of Rogers's direct appeal -- May 1984. Instead, the court relied on two Florida cases decided after 1995 -- more than ten years after the time of Rogers's direct appeal -- in support of its conclusion that Fla. R. Crim. P. 3.111(d)

does not create a *per se* requirement of reversal upon the failure to renew an offer of counsel. In so doing, the court of appeals ignored the fact that all of the numerous cases decided by the time of Rogers's direct appeal universally required reversal upon the trial court's failure to renew the offer of counsel at any subsequent stage of the proceedings. Instead, the court of appeals assessed counsel's performance under case law that was not decided until more than a decade after counsel acted.

Rogers filed a timely petition for rehearing on October 30, 2000. The court of appeals denied the petition for rehearing without explanation. (App. A3-A4.)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

The issue presented here is whether the constitutionality of counsel's performance must be assessed under the case law in effect as of the time of those actions. In *Strickland*, this Court made explicit that counsel's performance must be assessed under then-governing standards and cannot be judged with the distorting effects of hindsight. Yet here, the court of appeals based its analysis on hindsight -- it relied solely on case law decided a decade after the appeal to excuse appellate counsel's failure to raise an obvious claim of reversible error. The decision of the court of appeals denying habeas corpus relief on a claim of ineffective assistance of appellate counsel, without any reference to case law in effect as of the time of the direct appeal, cannot be reconciled with this Court's precedent, and

distorts the Sixth Amendment right to the effective assistance of counsel on direct appeal.

The court of appeals thus has "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

II. THE ELEVENTH CIRCUIT'S DECISION IGNORES THE LEGAL STANDARDS IN EFFECT AS OF THE TIME OF ROGERS'S DIRECT APPEAL AND CONTRAVENES THIS COURT'S PRECEDENT.

A. Courts Are Required to Assess Counsel's Performance by the Standards in Effect as of the Time of the Challenged Conduct.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that courts are to assess counsel's performance by the legal standards in effect at the time of counsel's actions. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689 (emphasis added). "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct . . . viewed as of the time of counsel's conduct. *Id.* at 690 (emphasis added). *Accord Roe v. Flores-Ortega*, 120 S. Ct. 1029, 1034-35 (2000) (quoting *Strickland*); *Pelmer v. White*, 877 F.2d 1518, 1522 (11th Cir. 1989) (refusing to judge trial counsel's performance by legal standards that were adopted during the pendency of the defendant's direct appeal, and holding that claims of ineffective assistance must be gauged according to the legal standards in effect at the time of counsel's performance).

B. Florida Law in Effect as of the Time of Rogers's Direct Appeal Universally Required Reversal Based on a Trial Court's Failure to Renew the Offer of Counsel.

It has long been established as a matter of Florida law that a trial court must renew an offer of counsel to a *pro se* defendant at each critical stage of the proceedings after the defendant first waives the right to counsel. This requirement is codified in Fla. R. Crim. P. 3.111(d)(4): "If a waiver [of counsel] is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel" (emphases added).[6] Florida law "clearly mandates that the trial court renew its offer to appoint counsel." *Billions v. State*, 399 So. 2d 1086, 1086-87 (Fla. Dist. Ct. App. 1981).

Thus, as the Florida Supreme Court held in *Traylor v. State*, 596 So. 2d 957, 968 (Fla. 1992), "the defendant is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel" (emphasis added). "At the commencement of each such stage, an unrepresented defendant must be informed of the right to counsel and the consequences of waiver." *Id.* "Where the right to counsel has been

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[6] The word "shall" makes this a mandatory requirement under Florida law. *See, e.g., Allied Fidelity Ins. Co. v. State*, 415 So. 2d 109, 111 (Fla. Dist. Ct. App. 1982) (where "'shall' refers to some required action . . . it is held to be mandatory") (citing *S. R. v. State*, 346 So. 2d 1018 (Fla. 1977)).

properly waived, the State may proceed with the stage in issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented." *Id.* (emphasis added).

The rule has a clear purpose: to ensure that the *pro se* defendant does not operate under the misapprehension that he has irrevocably waived his right to counsel once he makes an initial decision to represent himself. *Sampson*, 466 So. 2d at 1181-82. Otherwise, a *pro se* defendant may well stumble from one error to the next, thinking that he is forever bound by his initial decision in a pretrial hearing. This is far more than a technical distinction. It certainly would not be intuitive to a criminal defendant to believe that he could waive his right to counsel but then later decide to "unwaive" that right.

Both voir dire and trial are separate critical stages of the proceedings at which the trial court must renew the offer of counsel. *See Jones v. State*, 650 So. 2d 1095, 1096 (Fla. Dist. Ct. App. 1995) (voir dire); *Sampson*, 466 So. 2d at 1182 (evidentiary phase of trial). Sentencing is another distinct phase at which the offer of counsel must be renewed. *See Tucker v. State*, 440 So. 2d 60, 62 (Fla. Dist. Ct. App. 1983).

A violation of the requirement to renew the offer of counsel can never be harmless error and requires reversal under Florida law. An "appellate court faced with a record of non-compliance [with Rule 3.111(d)] has no alternative but to reverse and remand for a new trial

. . . no matter how overwhelming the evidence of guilt may be." *Jones*, 650 So. 2d at 1096.[7]

Here, Rogers's appointed lawyer filed her brief on direct appeal on May 1, 1984. As of that time, in at least nine reported decisions -- all of which were entered months and even years before Rogers's appointed counsel filed her brief on direct appeal -- the Florida District Courts of Appeal had held, without exception, that reversal was compelled by Fla. R. Crim. P. 3.111(d)(5) when a trial court failed to renew the offer of counsel at any subsequent stage of the proceedings:

In *Billions*, 399 So. 2d at 1087, the trial court failed to renew the offer of counsel at sentencing. The district court of appeal held that Fla. R. Crim. P. 3.111(d)(5) "clearly mandates that the trial court renew its offer to appoint counsel at the sentencing stage of the trial," and was "compelled to vacate the sentences imposed and remand this cause to the trial court for resentencing, prior to which an offer of assistance of counsel shall be made by the trial judge."

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[7] The involvement of standby counsel (or, as here, a lawyer who provides "assistance" but is not responsible for the defense) does not alter the trial court's obligation to renew the offer of counsel. Even if standby counsel is involved, the defendant is appearing without counsel -- and Florida law specifically requires that the offer of assistance shall be renewed whenever a defendant proceeds without counsel. Thus, Florida courts specifically have held that the trial court must "give the same warnings to [a] defendant who has standby counsel as to one who does not." *Payne v. State*, 642 So. 2d 111, 111-12 (Fla. Dist. Ct. App. 1994); *accord Taylor v. State*, 610 So. 2d 576, 577 (Fla. Dist. Ct. App. 1992).

In *Baranko v. State*, 406 So. 2d 1271, 1272 (Fla. Dist. Ct. App. 1981) (per curiam), the trial court neglected to renew the offer of counsel at sentencing. The district court of appeal held that "it was error to fail to renew the offer of assistance of counsel at the sentencing hearing," vacated the sentence and remanded for resentencing.

In *Sayers v. State*, 423 So. 2d 985, 986 (Fla. Dist. Ct. App. 1982) (per curiam), the court was compelled to vacate the defendant's sentences and "reman[d] to the trial court for resentencing" because the offer of counsel had not been renewed.

In *Clark v. State*, 442 So. 2d 1044, 1044 (Fla. Dist. Ct. App. 1983), the district court of appeal reversed a conviction and sentence and remanded for a new trial after the trial court failed to renew the offer of counsel after the defendant's initial waiver.

In *Tucker*, 440 So. 2d at 62, the defendant argued that the trial court failed to renew the offer of counsel at sentencing. The district court of appeal agreed, and "reversed and remanded for a new trial."

In *Felton v. State*, 438 So. 2d 1049, 1049 (Fla. Dist. Ct. App. 1983), the trial court offered counsel at arraignment and later at sentencing, but neglected to renew the offer at the start of trial. The district court of appeal reversed and ordered a new trial, based on "the trial court's failure to make proper inquiry at the time of trial."

In *James v. State*, 428 So. 2d 706, 707 (Fla. Dist. Ct. App. 1983), "the trial court failed to inquire at sentencing whether appellant desired counsel at that point. A trial court has a duty to inform a defendant of

his right to counsel at each critical stage of the criminal proceeding, Fla. R. Crim. P. 3.111(d)(5), which includes the sentencing stage, and it was error to fail to renew the offer of assistance of counsel at the sentencing hearing." The district court of appeal remanded for resentencing.

In *Gurchick v. State*, 439 So. 2d 1002, 1003 (Fla. Dist. Ct. App. 1983), the court vacated the defendant's sentence "because the trial court failed to advise appellant of his right to counsel at this critical stage of the criminal proceeding."

A district court of appeal held that the trial court was "required to renew the offer of counsel for the sentencing phase of the proceedings," vacated the sentence and remanded for resentencing in *Sanderson v. State*, 447 So. 2d 374, 377 (Fla. Dist. Ct. App. 1984), *approved in part, quashed in part*, 469 So. 2d 1383 (Fla. 1985) (affirming portion of decision vacating sentence for failure to renew offer for counsel, and quashing portion of decision that revoked petitioner's probation).

In fact, after a diligent search of reported cases, undersigned counsel have not located a single reported case decided by the time of Rogers's direct appeal in which a Florida court did not find reversible error where the trial court failed to renew the offer of counsel to a *pro se* defendant.[8]

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[8] Florida cases decided after the time of Rogers's direct appeal continued to require reversal when a trial court failed to renew the offer of counsel. *See, e.g., Sproule v. State*, 719 So. 2d 349, 351 (Fla. Dist. Ct. App. 1998); *Jones v. State*, 650 So. 2d 1095, 1096 (Fla. Dist. Ct. App. 1995); *Cooper v. State*, 576 So. 2d 1379, 1380 (Fla. Dist. Ct. App. 1991); *Hayes* (continued...)

Because the court of appeals was bound to determine the effectiveness of Rogers's appointed counsel "as of the time of counsel's conduct," *Strickland*, 466 U.S. at 690 (emphasis added), the court erred in relying on post-1995 case law to gauge counsel's performance on direct appeal in 1984. Florida law at the time of Rogers's direct appeal clearly established that a failure to renew the offer of counsel was *per se* reversible error. Because absolutely no case law in effect in 1984 even suggested that this claim would not require reversal on direct appeal under the settled legal standards of that time, competent counsel would have raised this claim, and Rogers's conviction would have been reversed under settled Florida law.[9] The failure to raise this obvious

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v State, 566 So 2d 340, 342 (Fla. Dist. Ct. App. 1990); *Parker v. State*, 539 So. 2d 1168, 1169 (Fla. Dist. Ct. App. 1989); *Morgan v. State*, 504 So 2d 504, 505(Fla. Dist. Ct. App. 1987); *Brown v. State*, 479 So. 2d 152, 153 (Fla. Dist. Ct. App. 1985); *Sampson v. State*, 466 So. 2d 1181, 1182 (Fla. Dist. Ct. App. 1985); *Brown v. State*, 479 So. 2d 152, 153 (Fla. Dist. Ct. App. 1985).

[9] Even if the court of appeals were correct in looking to post-1984 cases to judge appellate counsel's effectiveness, the court of appeals misread the recent Florida cases to which it cited in its decision. In *State v. Roberts*, 677 So. 2d 264 (Fla. 1996), the court stated that "under normal circumstances, rule 3.111(d)(5) requires a trial court to advise a *pro se* defendant of the right to counsel at each subsequent stage of trial." *Id.* at 265. However, the court noted that application of the rule to the facts of that case would lead to an "absurd result," and would have permitted the defendant to "abuse the dignity of the court or to frustrate orderly proceedings," *id.* at 266, because the defendant had displayed a pattern of disrupting the trial. Subsequent Florida courts have specifically limited the

(continued...)

claim of reversible error therefore deprived Rogers of his right to the effective assistance of counsel on direct appeal.[10]

Roberts holding to situations in which the defendant's actions reflect an intent to "abuse the dignity of the court." *See Norman v. State*, 699 So. 2d 854, 854 (Fla. Dist. Ct. App. 1997); *see also Beard v. State*, 751 So. 2d 61, 62 (Fla. Dist. Ct. App. 1999). Here, the State has conceded that Rogers did not disrupt the proceedings; nothing in the record suggests that this narrow exception applies.

The court of appeals also cited *Mincey v. State*, 684 So. 2d 236 (Fla. Dist. Ct. App. 1996), which held that the offer of counsel need not be renewed to a *pro se* defendant where the defendant is represented by standby counsel who actively participates in the defense. In *Mincey*, standby counsel "participated in a number of pretrial hearings, including examining witnesses," "participated in voir dire, and in the exercise of jury challenges," "made all of the legal arguments during trial, including those in support of the motions for a judgment of acquittal," "filed a motion for a new trial," "argued the motion for a new trial, and handled the sentencing." *Mincey*, 684 So. 2d at 238 (emphasis added). *See also Harrell v. State*, 486 So. 2d 7, 7 (Fla. Dist. Ct. App. 1986) (per curiam) ("standby counsel participated in the defense at trial").

In this case, on the other hand, standby counsel was appointed in an "advisory" capacity only, and served no role in Rogers's trial. Rogers conducted the entire defense.

[10] Numerous decisions establish that counsel's failure to raise a claim of reversible error on direct appeal deprives a defendant of his constitutional right to the effective assistance of counsel. *See, e.g., Mapes v. Coyle*, 171 F.3d 408, 427-29 (6th Cir.), *cert. denied*, — U.S. —, 120 S. Ct. 369 (1999); *Jackson v. Leonardo*, 162 F.3d 81, 85 (2d Cir. 1998); *Clemmons* (continued...)

C. The Trial Court Never Renewed the Offer of Counsel to Rogers.

In this case, the trial court never renewed the offer of counsel to Rogers after he initially waived his right to counsel. Rogers was permitted to proceed *pro se* on August 22, 1983, the first day of trial, and a mistrial was granted several days later. The second trial did not begin until several months later, on October 31, 1983. Yet the offer of counsel was not renewed – at voir dire before the second trial, at any time before the evidentiary phase of the second trial, or before the sentencing phase of the second trial.

The failure to renew the offer of counsel is particularly egregious in this case, given the trial court's reversal in September 1983 of its critical evidentiary ruling governing the admission of other-crimes evidence to prove Rogers's guilt. (Page 6, *supra*.) When Rogers waived his right to counsel in August 1983, he confronted a relatively simple set of facts involving a single armed robbery. Yet when the trial court reversed itself a month later, and permitted the prosecution to introduce other-crimes evidence as substantive proof of guilt, the defense became enormously more complex. The trial court itself recognized that the "defense posture [had] changed" as a result of its reversal on this key evidentiary ruling. (Page 6, *supra*.) Whatever calculus had applied when Rogers

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v. Delo, 124 F.3d 944, 954 (8th Cir. 1997); *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995); *Freeman v. Lane*, 962 F.2d 1252, 1257-58 (7th Cir. 1992); *Orazio v. Dugger*, 876 F.2d 1508, 1510 (11th Cir. 1989); *Matire v. Wainwright*, 811 F.2d 1430, 1438-39 (11th Cir. 1987).

waived his right to counsel in August 1983 was now fundamentally altered -- but the offer of counsel was never renewed.

Rogers was in fact never told that he was not forever bound by his initial decision to proceed *pro se*. To the contrary, in one exchange halfway through the second trial, the trial court strongly implied -- contrary to Florida law -- that Rogers could not reassert his right to counsel. When Rogers asked for assistance in obtaining documents held by another court, the trial court essentially told Rogers that he had made his decision and was stuck with it:

> You're representing yourself and you made that decision to represent yourself, and then you say, "Well, golly, gee, I have so much difficulty getting all this done." Well, so what. You take your choice, I guess.... I mean, Mr. Rogers has undertaken to represent himself. And he goes by the same rules.

Far from renewing the offer of counsel, the trial court's comments were stark: "You're representing yourself and you made that decision . . . . Well, so what. You take your choice, I guess."

In sum, the trial court failed to comply with an explicit requirement of Florida criminal procedure governing any case where a defendant proceeds *pro se*. The court never renewed the offer of counsel at any stage of the proceedings, despite an intervening mistrial, a

critical evidentiary ruling, and the passage of many months before the second trial. This error was obvious and self-evident from even a cursory review of the record.

Under settled precedent, the court of appeals was bound to analyze appellate counsel's performance under the case law in effect at the time of Rogers's direct appeal. That case law universally recognized that the failure to renew the offer of counsel was *per se* reversible error under Florida law. Counsel's failure to raise this obvious claim of reversible error fell below minimally competent standards of representation. And the failure of the court of appeals to analyze counsel's performance under the standards in effect at the time of the direct appeal was flatly contrary to this Court's precedent and a manifest error of law.

CONCLUSION

The court of appeals disregarded this Court's explicit precedent in failing to apply the law in effect at the time of Rogers's appeal to assess the performance of Rogers' counsel on direct appeal. Appellate counsel's failure to raise a claim of reversible error under then-prevailing law denied Rogers his right to the effective assistance of appellate counsel. The contrary conclusion of the court of appeals is manifest legal error under this Court's precedent.

The petition should be granted.

Respectfully submitted,

Jerrel E. Phillips
P.O. Box 14463
Tallahassee, FL 32317
(850) 877-8660

John G. Buchanan III
Timothy C. Hester*
Mark E. Porada
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

* Counsel of Record
Attorneys for Petitioner

February 23, 2001

APPENDIX

United States Court of Appeals
For the Eleventh Circuit

No. 99-10065

District Court Docket No. 97-01043-CIV

JERRY LAYNE ROGERS,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED.

Entered: October 12, 2000
For the Court: Thomas K. Kahn, Clerk
By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: DEC 06 2000

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10065-EE

FILED NOV 27, 2000

JERRY LAYNE ROGERS,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,

Respondent-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

---

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Jerry Lane Rogers is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

ORD-41

[DO NOT PUBLISH]

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10065

FILED OCT. 12, 2000

District Court Docket No.
97-01043-CIV-ORL-22

JERRY LAYNE ROGERS,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(October 12, 2000)

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

PER CURIAM:

Petitioner Jerry Layne Rogers ("Rogers") appeals the district court's order denying him habeas corpus relief pursuant to 28 U.S.C. § 2254. This court issued a certificate of appealability ("COA") on two issues: (1) whether Rogers received ineffective assistance of counsel because his lawyer failed to raise on direct appeal a claim of reversible error based on the trial court's failure to warn Rogers of the dangers and disadvantages of representing himself at trial; and (2) whether Rogers received ineffective assistance of counsel because his lawyer failed to raise on direct appeal a claim of reversible error based on the trial court's failure to renew the offer of counsel to Rogers as required by Fla.R.Crim.P. 3.111(d). After reviewing the record, we affirm the judgment of the district court denying habeas relief.

I. BACKGROUND

The authorities arrested Rogers and charged him with two counts of armed robbery in connection with the robbery of a Publix store in Orange County, Florida. During pretrial proceedings, the state trial court declared Rogers indigent and appointed Charles Tabscott ("Tabscott") to represent him. The day before the trial, Rogers informed the trial court that he wished to represent himself The trial court conducted a colloquy with Rogers, Tabscott, and the State Attorney. Following the colloquy, the trial court granted Tabscott's motion to withdraw and allowed Rogers to proceed *pro se*, with Tabscott remaining in an advisory capacity. Three days

into the trial, the trial court granted a mistrial because a state witness repeatedly commented on other crimes allegedly involving Rogers. Prior to the second trial, the trial court reversed its ruling on the admission of the other crimes evidence, Consequently, Rogers requested a one-month continuance, which the trial court granted. Rogers continued to represent himself at his second trial and his sentencing hearing.

The trial court appointed counsel to represent Rogers on direct appeal. Counsel filed a brief, raising seven claims, but failed to raise any claim under *Faretta v. California*, 422 U.S. 806 (1975), or Fla.R.Crim.P. 3.111. The Florida Fifth District Court of Appeal affirmed Rogers's convictions and sentences without written opinion. On November 6, 1995, Rogers filed an original petition for writ of habeas corpus in Florida state court. Rogers argued that he was denied the right to effective assistance of appellate counsel because his counsel failed to raise any challenge to the constitutionality and legality of his waiver of trial counsel. The state appellate court denied Rogers's petition without written opinion. Rogers then filed a federal habeas corpus petition on August 24, 1997. Without conducting an evidentiary hearing, the district court denied the petition. Rogers filed a timely notice of appeal. The district court denied him a COA, but this court issued Rogers a certificate on the two issues previously mentioned.

II. STANDARD OF REVIEW

The Anti-Effective Death Penalty Act ("AEDPA") which became effective on April 24, 1996, governs this court's review of Rogers's federal habeas petition because he filed his petition after the Act's effective date. *See* 28 U.S.C. § 2241 *et seq.*; *Wilcox v. Florida Dep't of Corrections*,

158 F.3d 1209, 12 10 (11th Cir. 1998), *petition for cert. filed*, _ U.S.L.W. (U.S., May 23, 2000) (No. 99-9681). The AEDPA amended portions of the habeas statute and added a provision which determines a federal court's review over habeas corpus petitions. Title 28 U.S.C. § 2254(d)(1) & (2) provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

When considering the "clearly established law" requirement, the Supreme Court has stated that "[t]he

antiretroactivity rule recognized in *Teague [v. Lane*, 489 U.S. 288 (1989)], which prohibits reliance on 'new rules,' is the functional equivalent of a statutory provision commanding exclusive reliance on 'clearly established law."' *Williams v. Taylor*, __ U.S. __, 120 S.Ct. 1495, 1506 (2000). The Court further held that "[i]t is perfectly clear that AEDPA codifies Teague to the extent that Teague requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final." *Id.* The determination whether or not a rule is clearly established at the time a state court renders its final judgment of conviction is a question the federal courts must independently evaluate. *See id.* at 1507.

In discussing the "contrary to, or an unreasonable application of' requirement, the Court noted that the message Congress intended to convey by the use of this phrase "is not entirely clear." *Id.* at 1508. The Court noted, however, that "the text [of the statute] is fairly read simply as a command that a federal court not issue the habeas writ unless the state court was wrong as a matter of law or unreasonable in its application of law in a given case." *Id.* at 1509. The Court reasoned that "it seems clear that Congress intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ." *Id.* Accordingly, "federal habeas courts must make as the starting point of their analysis the state courts' determinations of fact." *Id.* However, after carefully considering all the reasons for accepting the state court's judgment, the federal court, if still convinced that the prisoner's conviction violates the

Constitution, should not accept the state court's judgment. *See id.* at 1511.

III. DISCUSSION

The State argues that Rogers's claims of ineffective assistance of appellate counsel are procedurally barred in federal court because state procedural rules provide that his state habeas petition was untimely. The State raised this argument in a motion to dismiss, which the state appellate court denied. Therefore, we must assume that the state appellate court considered the petition on the merits since it did not clearly and expressly rely on an independent and adequate state procedural ground to dismiss the petition. *See Coleman v. Thompson*, 501 U.S. 722, 735 (1991).

Rogers's claims of ineffective assistance of appellate counsel are governed by the standard enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).[1] Because the state appellate court did not issue a written opinion denying Rogers's state habeas petition alleging claims of ineffective assistance of counsel, this court must consider, in its independent judgment, whether Rogers's claims rise to the level of a constitutional violation. *See Williams*, 120 S.Ct. at 1509-11.

A. The *Faretta* claim

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[1] To prove a claim of ineffective assistance of appellate counsel, Rogers must show that counsel's performance was deficient and that, but for that deficient performance, the result of his appeal would have been different. *See Strickland*, 466 U.S. at 687-88.

Rogers argues that his appellate counsel was ineffective for failing to raise a *Faretta* claim on direct appeal. Specifically, Rogers contends that the trial court did not conduct an adequate inquiry into his desire for self-representation, and since this establishes a constitutional violation, his appellate counsel was ineffective for failing to raise the argument on appeal. In *Faretta*, the Supreme Court held that an accused has a Sixth Amendment right to represent himself. *See* 422 U.S. at 819. Before a court permits a defendant to proceed *pro se* at trial, the defendant must clearly and unequivocally assert the right of self-representation. *See Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1064 (11th Cir. 1986). The record in this case indicates that on numerous occasions, Rogers asserted to the trial court his wish to proceed *pro se*. Moreover, the record does not demonstrate that Rogers equivocated in his desire to represent himself.

Faretta also holds that a trial court should conduct a waiver hearing to ensure that the defendant understands the disadvantages of self-representation. *See Faretta*, 422 U.S. at 835; *Fitzpatrick*, 800 F.2d at 1065. The trial court did conduct a colloquy during which it discussed with Rogers his wish to represent himself. During the colloquy, the trial court noted that Rogers had participated in prior criminal proceedings, was educated, and intelligent. The trial court also noted that Tabscott would be available to assist Rogers during the trial. Tabscott told the court that if anyone was capable of representing himself, it was Rogers. Based on this, the trial court permitted Rogers to proceed *pro se*. Rogers claims that this "colloquy" was inadequate under *Faretta* because the trial court did not adequately inform Rogers of the risks and disadvantages of self-representation.

A review of the record discloses that the trial court did not delve into Rogers's understanding of the risks

and dangers inherent in self-representation; however, the law does not require such a rigid inquiry. "[T]he case law indicates that, while a waiver hearing expressly addressing the disadvantages of a *pro se* defense is much to be preferred, it is not absolutely necessary." *Fitzpatrick*, 800 F.2d at 1065. "The ultimate test is not the trial court's express advice, but rather the defendant's understanding." *Id.* As long as the record indicates that Rogers's decision to represent himself was made with an understanding of the risks of self-representation, then the knowing, intelligent, and voluntary waiver standard of the Sixth Amendment is satisfied. *See id.* In short, so long as the record establishes that Rogers "knew what he was doing and his choice was made with eyes open," then this court will uphold the trial court's decision. *See id.* (quoting *Faretta*, 422 U.S. at 835).

The record shows that the *Faretta* standard was met in this case. Rogers never wavered from his decision to represent himself Tabscott assisted Rogers on a few occasions, but Rogers never indicated that he needed more assistance from Tabscott. Rogers was articulate during the trial, stating objections, conducting *voir dire*, and examining witnesses as well as a lawyer would. As the trial court noted, Rogers was educated and intelligent. Moreover, Rogers had prior criminal trial experience and knew that his sentence could range from zero to life in prison. All of these factors demonstrate that Rogers knew of the dangers inherent in self-representation and that he made his decision with "eyes open." Accordingly, we see no *Faretta* violation, and therefore, no Sixth Amendment violation for appellate counsel's failure to raise this allegedly "winning" argument on appeal.[2]

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[2] We find a companion case of Rogers's elucidating in this situation. *See Rogers v. Singletary*, 698 So.2d 1178 (Fla. 1996)

B. The Rule 3.111(d) claim

Rogers also argues that his appellate counsel was ineffective for failing to argue on appeal that the trial court's failure to abide by Fla.R.Crim.P. 3.111(d), which requires a trial court to advise a *pro se* defendant at each subsequent stage of the proceedings that he can invoke his right to counsel, violated his constitutional rights. He claims that under Florida law, the trial court's failure to do this is reversible error. Thus, his appellate counsel was ineffective for failing to raise this argument on appeal.

Rogers cannot prevail on this claim because there is no *per se* rule in Florida that a trial court's failure to inform a defendant of his right to counsel at each subsequent stage of the proceeding as required by Fla.R.Crim.P. 3.111(d) constitutes reversible error. *See State v. Roberts*, 677 So.2d 264, 265 (Fla. 1996) (upholding a conviction even though the trial court failed to advise a *pro se* defendant of the right to counsel at each subsequent stage of trial); *Mincey v. State*, 684 So.2d 236, 238 (Fla. Dist. Ct. App. 1996) (holding that a trial court's failure to renew offer to appoint counsel at each stage of proceeding subsequent to that at which defendant represented himself with assistance of stand-by counsel, was harmless error); *Crystal v. State*, 616 So.2d 150, 152 (Fla. Dist. Ct. App. 1993) (trial court's decision on defendant's request to represent himself is reviewed for abuse of discretion); *see also Harrell v. State*, 486 So.2d 7, 7-8 (Fla. Dist. Ct. App. 1986) ("The continuous presence of

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(holding that a formal *Faretta* hearing is not necessary to determine a defendant's understanding of his waiver of counsel).

stand-by counsel served as a constant reminder to [defendant] of his right to counsel.").

Instead, the Florida courts focus on the defendant's understanding of the waiver of counsel and his competency to waive counsel. *See State v. Bowen*, 698 So.2d 248, 251 (Fla. 1997) (noting that the focus in conducting a waiver-of-counsel hearing under Rule 3.111 should be on the defendant's competence to waive counsel, not on his competence to represent himself). Particularly, Florida law requires the trial court to inquire into a defendant's education and prior criminal experience. *See Johnston v. State*, 497 So.2d 863, 868 (Fla. 1986) (when making waiver determination, trial court should inquire into a defendant's age, mental status, and lack of knowledge and experience in criminal proceedings). The trial court did that in this case. Accordingly, pursuant to Florida law, the trial court conducted a sufficient inquiry under Rule 3.111. Therefore, Rogers's appellate counsel was not ineffective for failing to raise this argument on appeal.

IV. CONCLUSION

Based on the foregoing analysis, we affirm the judgment of the district court. AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10065-E FILED DEC. 13, 2000

JERRY LAYNE ROGERS,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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ORDER:

Appellant's "motion for correction of order granting certificate of appealability" is GRANTED.

Accordingly, appellant's motion for certificate of appealability is GRANTED on the following issue(s) only:

Whether appellate counsel was constitutionally ineffective for failing to argue on direct appeal that the trial court did not adequately warn appellant of the dangers and disadvantages of representing himself at trial.

Whether appellate counsel was constitutionally ineffective for failing to argue on direct appeal that the trial court did not renew an offer of counsel to appellant at any time after appellant waived his right to counsel.

No certificate of appealability should issue on any other claims because he failed to make a substantial showing of the denial of a constitutional right, see 28 U.S.C. § 2253(c)(2).

/s/ ED CARNES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10065-E FILED DEC 01, 1999

JERRY LAYNE ROGERS,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

ORDER:

Appellant's "motion for certificate of appealability is GRANTED on the following issue(s) only:

Whether appellate counsel was constitutionally

ineffective for failing to argue on direct appeal that the trial court did not adequately warn appellant of the dangers and disadvantages of representing himself on appeal.

Whether appellate counsel was constitutionally ineffective for failing to argue on direct appeal that the trial court did not renew an offer of counsel to appellant at any time after appellant waived his right to counsel.

No certificate of appealability should issue on any other claims because he failed to make a substantial showing of the denial of a constitutional right, see 28 U.S.C. § 2253(c)(2).

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JERRY LAYNE ROGERS,

Petitioner

v. CASE NO. 97-1043-CIV-ORL-22

HARRY K. SINGLETARY, et al.,

Respondents.

ORDER

This case is before the Court on the following motion:

MOTION: Petitioner's Motion for Reconsideration (Doc. No. 31, filed April 8, 1999).

Thereon it is **ORDERED** that the motion is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Florida this 12th day of April, 1999.

/s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

Copies to:
pslc 4/12
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JERRY LAYNE ROGERS,

Petitioner

v. CASE NO. 97-1043-CIV-ORL-22

HARRY K. SINGLETARY, et al.,

Respondents.

ORDER

This case is before the Court on the following motion:

Petitioner's Request for A Certificate of Appealability (Doc. No. 29, filed March 22, 1999) is **DENIED**. Petitioner has not made a substantial showing of the deprivation of any federal constitutional right.

DONE AND ORDERED in Chambers at Orlando, Florida this 29th day of March, 1999.

/s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

Copies to:
pslc 3/23
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JERRY LAYNE ROGERS,

Petitioner

v. Case No. 97-1043-Civ-Orl-22B

HARRY K. SINGLETARY, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the petition for Writ of Habeas Corpus filed by Jerry Layne Rogers is DENIED, and this case is DISMISSED WITH PREJUDICE. Wherefore, the Petitioner shall take nothing, and the action be dismissed on the merits.

Date: February 23, 1999

RICHARD D. SLETTEN,
CLERK

By: /s/ H. Lang
H. Lang, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JERRY LAYNE ROGERS,

Petitioner

v.

HARRY K. SINGLETARY, et al.,

Respondents.

FILED 99 FEB 22

Case No. 97-1043-Civ-Orl-22B

ORDER

Petitioner initiated this action for habeas corpus relief pursuant to 28 U.S.C.§ 2254. Upon consideration of the petition, the Court ordered Respondents to show cause why the relief sought in the petition should not be granted. Thereafter, Respondents filed a timely reply to the petition for writ of habeas corpus in compliance with this Court's instructions and with the *Rules Governing Section 2254 Cases in the United States District Courts* (Doc. No. 20, filed December 22, 1997). Petitioner alleges three claims for relief in his habeas petition: first, that the trial court failed to adequately warn Petitioner of the dangers and disadvantages of self-representation; second, that he received ineffective assistance of counsel; and third, that he received ineffective assistance of appellate counsel.

V. Procedural History

Petitioner was charged by information with two counts of armed robbery.[3] A jury trial was held, which resulted in a mistrial. A second jury trial was later held, and Petitioner was found guilty as charged in the information. The trial court adjudicated Petitioner guilty of two counts of armed robbery and sentenced him to imprisonment for a term of twenty years as to each count, with the sentences to run concurrently.

Petitioner Filed a direct appeal with the Florida Fifth District Court of Appeal, which affirmed *per curiam*. Almost eleven years later, Petitioner filed a petition for writ of habeas corpus with the Fifth District, which was denied.

VI. Claims One and Two

Claims one and two were not raised with the state courts. The federal court must dismiss those claims or portions of claims that either (1) have been explicitly ruled procedurally barred by the highest state court considering the claims,[4] or (2) are not exhausted but would clearly be barred if returned to state court.[5] Thus,

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[3] According to Petitioner, "[b]ecause money was taken from two people during a single incident at the Publix store, (Petitioner] was charged with two separate armed robberies . . . ."

[4] *Harris v. Reed*, 489 U.S. 255 (1989).

[5] *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, there is a procedural default for federal habeas purposes regardless of

"[f]ederal courts are precluded from addressing claims that have been held to be procedurally defaulted under state law. In addition, federal courts may not address claims that have not been presented in state court if the state court would have found the claims to be procedurally defaulted . . . ." *Tower v. Phillips*, 7 F.3d 206, 210 (11th Cir. 1993).[6]

Claims one and two are procedurally barred in this Court because they were not raised with the state courts. There are two exceptions to the procedural default bar. The first is the "cause and prejudice" exception;[7] the second, which is a narrow one, is the "actually innocent" exception, also known as the "fundamental miscarriage of justice" exception, used in extraordinary circumstances. *See Johnson v. Singletary*, 938 F.2d 1166, 1174-75 (11th Cir. 1991), *cert. denied*, 506 U.S. 930 (1992). In the present case, Petitioner has not shown either cause or prejudice that would excuse the default.

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the decision of the last state court to which the petitioner actually presented his claims); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990), cat. denied, 499 U.S. 982 (1991) ("[w]hen a claim is never presented to the state court *Teague* does not require that the last state court rendering judgment 'clearly and expressly' state that its judgment rests on a procedural bar.").

[6] Also, if the petitioner attempts to raise the claim in a manner not permitted by state procedural rules, he is barred from pursuing the same claim in federal court. *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994), *cert. denied*, 513 U.S. 1061 (1995).

[7] *See Engle v. Isaac*, 456 U.S. 107, 129 (1982) ("when a procedural default bars state litigation of a court claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice.").

Likewise, Petitioner has neither alleged nor shown the applicability of the actually innocent exception. The entire record has been reviewed, and the Court concludes that Petitioner is unable to satisfy either of the exceptions to the procedural default bar. Therefore, claims one and two must be denied.

VII. Claim Three

Petitioner contends that he received ineffective assistance of appellate counsel because appellate counsel failed to argue that the trial court erred when it failed to advise him at the second trial of his right to be represented by counsel.

The record reflects that Petitioner's appellate counsel raised ***seven*** issues on direct appeal. Petitioner's appellate counsel submitted an initial brief which was comprehensive, thorough, and well-argued. Certainly, the record clearly evinces the thoroughness and reasonableness of appellate counsel's work. *Cf. Thomas v. Scully*, 854 F. Supp. 944 (E.D.N.Y. 1994) (the appellate brief submitted by counsel clearly showed the thoroughness of counsel's work). The fact that this other issue might have succeeded in the state appellate court "does not lead automatically to the conclusion that (Petitioner) was deprived of a constitutional right when his lawyer failed to assert such a claim." *Woodfork v. Russell*, No. 92-4301, 1994 WL 56933 (6th Cir. February 24, 1994) (unpublished opinion). As discussed by the district court in *Richburg v. Hood*, 794 F. Supp. 75 (E.D.N.Y. 1992),

> [T]he court simply notes that the decision of appellate counsel to choose among plausible options of appellate

> issues is preeminently a strategic choice and is "virtually unchallengeable." The petitioner has not even undertaken to demonstrate that the decision of his attorney not to raise this issue constituted an "unprofessional error" or that such error prejudiced his appeal.

Id. at 78. In this case, the Court finds that appellate counsel's decision not to pursue the other issue was consistent with reasonable appellate strategy that, under the deferential standard of review articulated in *Strickland*, should not be second-guessed. *See Gray v. White*, No. C-94-2434 EFL, 1997 WL 16311, at *9 (N.D. Cal. January 6, 1997) (citations omitted) ("appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. The weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy."); *Carlos v. Cruz*, No. CV 96-5209 (RED), 1997 WL 269591, at *4 (E.D.N.Y. April 21, 1997), *affirmed*, No. 97-2302, 1997 WL 829269 (2d Cir. December 8, 1997) (unpublished opinion) ("On appeal, counsel is not required to argue every non-frivolous issue; rather, the better strategy may be to focus on a few more promising issues so as not to dilute the stronger arguments with a multitude of claims"; moreover, the Court must not second-guess the reasonable decisions of appellate counsel to press certain issues instead of others, and the lack of success on appeal is not a basis to impugn appellate counsel's reasonable choices or performance).

Further, Petitioner has failed to demonstrate that this other issue would have been successful on direct appeal. Petitioner had waived his right to counsel during the first trial. There was overwhelming evidence of Petitioner's guilt. Petitioner was identified as one of the armed robbers by his accomplice, Thomas McDermid, and by eyewitnesses to the crimes. Therefore, it was appropriate for appellate counsel to have omitted this other issue on direct appeal. Accordingly, in light of 1) the discretion afforded to appellate counsel in selecting those issues most promising for review, and 2) Petitioner's failure to demonstrate that this other issue would have been viable on appeal, the Court finds that appellate counsel's performance was not deficient and that Petitioner has not demonstrated prejudice. Hence, claim three must fail.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus filed by Jerry Layne Rogers is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**. The Clerk of the Court shall enter judgment accordingly.

2. The Clerk of the Court is directed to close this case.

DONE AND ORDERED in Chambers at Orlando, Florida, this 19th of February, 1999.

/s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

Copies to:
pslc 2/19
Counsel of Record
Jerry Layne Rogers

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JERRY LAYNE ROGERS,

Petitioner

v. Case No. 95-2872

STATE OF FLORIDA, et al.,

Respondent.

DATE: August 28, 1996

BY ORDER OF THE COURT:

ORDERED that the PETITION FOR WRIT OF HABEAS CORPUS, filed November 7, 1995, is denied. Upon consideration thereof, it is

ORDERED that Petitioner's MOTION FOR LEAVE TO EXCEED PAGE LIMITS, filed July 16, 1996, is moot.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: /s/ Linda A. Howard
Deputy Clerk

(COURT SEAL)

cc: John G. Buchanan, III, Esq. and Timothy Hester, Esq. and Benedict Lenhart, Esq. and Michael S. Long, Esq.
Jerrel Phillips, Esq.
Office of the Attorney General, Daytona Beach
Harry K. Singletary
Office of the State Attorney, Daytona Beach

IN THE CIRCUIT COURT,
NINTH JUDICIAL
CIRCUIT, IN AND FOR
ORANGE COUNTY,
FLORIDA

CASE NO. CR 82-1939
FIFTH DCA NO. 95-2872

STATE OF FLORIDA,

Plaintiff,

vs.

JERRY LAYNE ROGERS,

Defendant

ORDER ON RECONSTRUCTION OF RECORD

On March 29, 1996, an order was entered by the Fifth District Court of Appeal of the State of Florida, remanding this cause to this court to reconstruct a record of proceedings conducting in this cause prior to the trial herein which commenced on October 31, 1983.

The proceedings which are alleged to have occurred for which there are no stenographic notes or other records available from which transcripts can be produced are hearings conducted on January 31, 1983, and March 25, 1983.

On May 16, 1996, a hearing was conducted at the orange County Courthouse. At that hearing both the State and the Defendant presented witnesses in an effort to reconstruct what transpired at those hearings.

The primary witness for the State, Assistant State Attorney Joe Cocchiarella, testified to what he recalled was the substance of the hearings, saying, if effect, that the Defendant came to each hearing seeking to represent himself, but that the Court pointed out the dangers of representing one's self and that the Defendant was talked out of it.

Witnesses called for the defense also failed to recall any specific testimony or evidence presented at these hearings.

Subsequent to the May 16 hearing each side has filed proposed orders and notions addressed to the other side's perception of what occurred at the hearing. Those motions and proposed orders were not enlightening and served no useful purpose in reconstructing the record in this cause.

The May 16 testimony did not refresh the recollection of this judge about what happened at these hearings. The record pleadings and orders reflect that, in any event, the Defendant did not begin to represent himself until after a hearing conducted on August 22, 1983, when Charles Tapscott, an attorney appointed to represent the Defendant, was permitted to withdraw. The transcript of that hearing is available as part of the record in this cause.

Therefore, this Court finds that it cannot reconstruct the record of these proceedings other than as set forth in this order.

ORDERED AND ADJUDGED at Kissimmee, Osceola County, Florida, this 30th day of May, 1996.

/s/ Ted Coleman
Ted Coleman, Circuit Judge

I CERTIFY that a copies of the foregoing were furnished by mail to Timothy C. Hester, Esq., COVINGTON & BURLING, 1201 Pennsylvania Ave., N.W., Washington, D.C. 20044, Jerrel Phillips, Esq., P. 0. Box 14463, Tallahassee, FL 32339-2400 Paula C. Coffman, Esq., Ast. State Attorney, P. 0. Box 1673, Orlando, FL 32802, and to Mark S. Dunn, Esq., Asst. Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, on the date of entry.

/s/ Dorothy Richardson
Judicial Assistant

IN THE UNITED STATES DISTRICT COURT OF
APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JERRY LAYNE ROGERS,

Petitioner

v. Case No. 95-2872

STATE OF FLORIDA, et al.,

Respondent.

DATE: March 29, 1996

BY ORDER OF THE COURT:

ORDERED that Respondent's MOTION TO RELINQUISH JURISDICTION TO RECONSTRUCT RECORD AND TO TOLL TIME FOR FILING RESPONSE, filed February 26, 1996, is granted. Accordingly, jurisdiction is relinquished to the Circuit Court for Orange County, Florida, to and including May 31, 1996, for the purpose requested. Respondent is granted to and including June 21, 1996, to comply with the November 30, 1995, Order of this Court.

I hereby certify that the foregoing is
(a true copy of) the original court order.

/s/ Frank J. Habershaw

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Clerk of the Court, Orange County (CR82-1939)
Timothy Hester, Esq.
Office of the Attorney General, Daytona Beach
Jerrel E. Phillips, Esq.
Harry K. Singletary
Michael Long, Esq.

IN THE UNITED STATES DISTRICT COURT OF
APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JERRY LAYNE ROGERS,

Petitioner

v. Case No. 95-2872

STATE OF FLORIDA, et al.,

Respondent.

DATE: February 2, 1996

BY ORDER OF THE COURT:

ORDERED that Respondent's MOTION TO DISMISS OR COMPEL, filed December 21, 1995, is denied. Respondent's ALTERNATIVE REQUEST TO SUPPLEMENT THE RECORD is granted. Respondent is granted to and including March 4, 1996, to file its Response in this cause.

I hereby certify that the foregoing is
(a true copy of) the original court order.

/s/ Frank J. Habershaw

FRANK J. HABERSHAW, CLERK

BY: _____

Deputy Clerk

(COURT SEAL)

cc: Timothy Hester, Esq.
Office of the Attorney General, Daytona Beach
Office of the State Attorney, Daytona Beach
Jerrel E. Phillips, Esq.
Harry K. Singletary
Michael Long, Esq.

Supreme Court, U.S.
FILED
MAR 29 2001
CLERK

(2)

NO. 00-1349

IN THE SUPREME COURT OF THE UNITED STATES

JERRY LAYNE ROGERS, SR.,
Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Fla. Dept. of Corrections
and
BRADLEY D. CARTER,
Warden, Union Correctional Institution
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN R. WHITE *
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 159089

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 EXT 4579

COUNSEL FOR RESPONDENT
*COUNSEL OF RECORD

32pp

QUESTIONS PRESENTED

[as stated in the Petition]

1. Whether the Eleventh Circuit erred as a matter of law in denying Petitioner's habeas corpus petition alleging ineffective assistance of appellate counsel when it failed to assess counsel's performance under the legal standards in effect at the time of Petitioner's direct appeal.

2. Whether the Eleventh Circuit erred as a matter of law in denying Petitioner's claim of ineffective assistance of appellate counsel where counsel failed to raise an obvious claim of reversible error on direct appeal.

TABLE OF CONTENTS

PAGE(S)

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

JURISDICTION 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

THE ELEVENTH CIRCUIT CORRECTLY ASSESSED STATE APPELLATE COUNSEL'S PERFORMANCE UNDER APPLICABLE STATE LAW, WHICH DOES NOT SUPPORT THE CURRENT CLAIM, AND CORRECTLY DENIED PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. THIS CLAIM IS A PURE MATTER OF FLORIDA LAW. IT DOES NOT PRESENT A FEDERAL QUESTION. 5

CONCLUSION 25

CERTIFICATE OF SERVICE 25

TABLE OF CITATIONS

CASES — PAGE(S)

FEDERAL CASES

Barclay v. Florida,
463 U.S. 939, 103 S. Ct. 3418,
77 L. Ed. 2d 1134 (1983) 7

Coleman v. Thompson,
501 U.S. 722, 111 S. Ct. 2546,
115 L. Ed. 2d 640 (1991) 7,9

Dandridge v. Williams,
397 U.S. 471, 90 S. Ct. 1153,
25 L. Ed. 2d 491 (1970) 6

Davis v. Packard,
32 U.S. 276, 32 U.S. 276 (1833) 6

Faretta v. California,
422 U.S. 806, 95 S. Ct. 2525,
45 L. Ed. 2d 562 (1975) 2,13,21,22

Gregg v. Georgia,
428 U.S. 153, 96 S. Ct. 2909,
49 L. Ed. 2d 859 (1976) 12

Griffin v. Wisconsin,
483 U.S. 868, 107 S. Ct. 3164,
97 L. Ed. 2d 709 (1987) 7,9

Jaffke v. Dunham,
352 U.S. 280, 77 S. Ct. 307,
1 L. Ed. 2d 314 (1957) 6

Lambrix v. Singletary,
520 U.S. 518, 117 S. Ct. 1517,
137 L. Ed. 2d 771 (1997) 8

Lockhart v. Fretwell,
506 U.S. 364, 113 S. Ct. 838,
122 L. Ed. 2d 180 (1993) 9,10,24

Marks v. U.S.,
430 U.S. 188, 97 S. Ct. 990,
51 L. Ed. 2d 260 (1977) 12

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984) 5,7,9,24

Terrell v. University of Texas System Police,
792 F.2d 1360 (5th Cir. 1986),
cert. denied, 479 U.S. 1064,
107 S. Ct. 948, 93 L. Ed. 2d 997 (1987) 6

Wainwright v. Sykes,
433 U.S. 72, 97 S. Ct. 2497,
53 L. Ed. 2d 594 (1977) 8,9

Williams v. Taylor,
529 U.S. 362, 120 S. Ct. 1495,
146 L. Ed. 2d 389 (2000) 6

STATE CASES

Brown v. State,
719 So. 2d 882 (Fla. 1998) 12,22

Clark v. State,
442 So. 2d 1044 (Fla. 4th Dist. Ct. App. 1983) . . 21

Continental Assur. Co. v. Carroll,
485 So. 2d 406 (Fla. 1986) 24

Dunn v. State,
454 So. 2d 641 (Fla. 5th Dist. Ct. App. 1984) . . . 12

Durham v. Palm Court, Inc.,
558 So. 2d 59 (Fla. 4th DCA 1990) 22

Felton v. State,
438 So. 2d 1049 (Fla. 3d Dist. Ct App. 1983) . 21,22

Greene v. Massey,
384 So. 2d 24 (Fla. 1980) 12

Harrell v. State,
486 So. 2d 7 (Fla. 3d Dist. Ct. App. 1986) . . . 13,21

Hicks v. State,
452 So. 2d 606 (Fla. 4th DCA 1984) 23

Hoffman v. Jones,
280 So. 2d 431 (Fla. 1973) 24

Reaves v. State,
485 So. 2d 829 (Fla. 1986) 12

Rogers v. Singletary,
698 So. 2d 1178 (Fla. 1996) 12,21

Sampson v. State,
466 So. 2d 1181 (Fla. 1st Dist. Ct. App. 1985) . . 13

Sanderson v. State,
447 So. 2d 374 (Fla. 1st DCA 1984) 22,23

Santos v. State,
629 So. 2d 838 (Fla. 1994) 12

State v. Sanderson,
469 So. 2d 1383 (Fla. 1985) 22,23

Tucker v. State,
440 So. 2d 60 (Fla. 1st Dist. Ct App. 1983) . . . 21,22

Virginia Insurance Reciprocal v. Walker,
765 So. 2d 229 (Fla. 1st DCA 2000) 22

FEDERAL STATUTES AND CONSTITUTION

28 USCA. § 2244 24,25

28 USCA § 2254(d) 1,7

U.S. Const. Art. III § 2, cl. 1 1,7

MISCELLANEOUS

Florida Rule of Criminal Procedure
3.111(d) 4,5,6,11,20,21,22

JURISDICTION

Respondents Moore and Carter submit that the Petition presents a pure matter of Florida law. Since there is no federal question, no federal jurisdiction lies here. See § 2254(d), USC; U.S. Const. Art. III § 2, cl. 1.

STATEMENT OF THE CASE[1]

Respondents submit the following clarifications and additions to Rogers' Statement of the Case.

The Petition (pp. 4-7) discusses events surrounding the "Publix trial." The State clarifies (See Petition 5 n. 2) that it had called McDermid as a witness (I tab 2 248-65) in the first "Publix trial," in which Rogers pro se moved for and obtained a mistrial (I tab 2. 265-68). In the second "Publix trial, "which resulted in the convictions and sentences at issue here, the State did not call McDermid as a witness (See II tabs 5-7 APP 470-768).[2] Although so-called Williams Rule evidence was included

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[1] In this Brief in Opposition, "Rogers" or "Petitioner" indicates Petitioner, JERRY LAYNE ROGERS, SR., and "State" or "Respondents" refers to MOORE and CARTER. "Petition" references Rogers' Petition for Writ of Certiorari here, unless noted otherwise. The record is cited using its Appendix volume number in the U.S. District Court followed by any applicable tab# and page #(s). Where available, the consecutive page numbers of the appendix to the Petition for Writ of Habeas Corpus ("APP") are used. Bold typeface is supplied for emphasis.

[2] Instead, the State's evidence in the second trial included, for example, eyewitness in-court and photospread identifications of Rogers as one of the robbers in this case, including a "positive" one (II tab 5 APP 477-79, 528, 551-57); a newspaper clipping of this robbery found in Rogers' wallet when he was arrested (II tab 6 APP 602, 603-604); a gun recovered (continued...)

in the second trial (See Petition 5-6), accomplice testimony was deleted from the state's case-in-chief. Therefore, the second trial was not "vastly more difficult" (Petition 6).

The trial court's inquiry pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), was not "an abbreviated colloquy" (Petition 5). The adequacy of the trial court's Faretta inquiry was litigated in the Eleventh Circuit, which held it to be sufficient, and Rogers has abandoned that claim here. (See Petition 9 n. 5)

As part of its Faretta inquiry, the trial court, after hearing defense counsel's and Rogers' presentations (I tab 1 APP 2-7), noted Rogers' intelligence and experience, and informed Rogers that he would remain responsible for his case:

> THE COURT: Well, he's indicated he wants Mr. Tabscott [standby counsel] to help him with the logistics of witness management, and Mr. Tabscott has indicated he's willing to do that. But if I permit him to withdraw, he is not the attorney of record. Pleadings would not be furnished to him; they would be furnished to you. And he would not be responsible for the conduct of the trial.
>
> I can take judicial notice that you have gone through one trial in this court, and I know also as a

---

[2](...continued)
from Rogers' residence (II tab 5 APP 563; tab 6 APP 601) of the same caliber as the one he used in the robbery (II tab 5 APP 476); substantial money recovered in Rogers' residence in small denominations (See II tab 6 APP 601: "large variety of bills"; APP 604. See also II tab 5 APP 564, II tab 6 APP 597), like the money stolen in this Publix robbery (II tab 5 APP 508); and, evidence identifying Rogers committing a similar robbery, i.e., the robbery of Daniels Market (II tab 6 APP 634-41, 669-74, 696-98).

matter of fact that you have gone through a trial before Judge Cornelius. So I know you have had at least two trials on the same – on charges of the same nature as the one that is pending here today.

So I agree with Mr. Tabscott that to the extent that one could represent one's self and not be a lawyer, you are probably as capable as anyone might be because of your experience in these cases.

It is my understanding of the law that in order to – that you have the right to represent yourself, and we cannot compel you to have a lawyer. All that needs to be done is for the court to establish that you are knowingly and voluntarily and intelligently requesting to represent yourself.

There is some suggestion that there needs to be a showing that you need to know what you're doing to some extent if you go to trial, but I'm sure that's the law. I believe on the basis of what's been told me that you are. I believe you have a high school degree, plus some college education, don't you?

THE DEFENDANT: Yes, sir.

THE COURT: And for the record, though, I would make the finding that not only are you intelligently waiving your right to counsel, but that you also have some background and knowledge in the conduct of the trial and the rules of procedure that would make you something less than a neophyte if you should go to trial.

The Petition (pp. 6-7) quotes a portion of the state trial court's comments pertaining to Rogers' pro se logistical difficulties. The State will clarify this excerpt at length infra by quoting from its surrounding context showing the trial court's reasoning and concerns over Rogers' related motion for mistrial.

Rogers (p. 7) characterizes standby counsel's role as "restricted" and summarizes his pro se representation. Rogers concludes (p. 7) that standby counsel's role was only "advisory." The State disputes any suggestion that standby counsel's profile was obscure. Instead, in the argument section the State will cite to instances in which standby counsel's presence was very visible and his role very active, albeit in line with the directions set by Rogers.

In argument infra, the State will show where the trial court record reflects that Rogers multiple times re-affirmed his desire to represent himself and demonstrated a level of intelligence capable of grasping the constant reminder standby counsel provided of his ability to re-invoke his right to counsel, thereby satisfying the purpose of the state rule of procedure at issue here. Indeed, immediately after being sentenced on the instant charges, Rogers initiated the appointment of the public defender for purposes of appeal. (III tab 12 1298)

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly held that the state trial court did not violate Florida law, that is, Fla.R.Cr.P. 3.111(d). Therefore, state appellate counsel was not unconstitutionally ineffective for failing to raise a Rule 3.111(d) claim, and there is no federal question. The Petition erroneously interprets Florida case law as it existed at the time of the 1984 state

appeal, overlooks state-trial-court facts that distinguish the cases it now tenders as supposedly showing the merits of the omitted state-appeal claim, and erroneously asserts that Florida case law developed subsequent to the state direct appeal is entirely irrelevant to his Strickland[3] claim. Rogers' arguments are too little, too late. They concern pure matters of Florida law as applied in this case, resulting in no federal question.

ARGUMENT

THE ELEVENTH CIRCUIT CORRECTLY ASSESSED STATE APPELLATE COUNSEL'S PERFORMANCE UNDER APPLICABLE STATE LAW, WHICH DOES NOT SUPPORT THE CURRENT CLAIM, AND CORRECTLY DENIED PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. THIS CLAIM IS A PURE MATTER OF FLORIDA LAW. IT DOES NOT PRESENT A FEDERAL QUESTION.

Rogers' Petition argues that counsel who represented him in a state direct appeal in 1984 was ineffective under Strickland because he did not tender a claim to Florida's Fifth District Court of Appeal. Rogers' claim would have argued that Florida Rule of Criminal Procedure 3.111(d) ("Fla.R.Cr.P. 3.111(d)") required that he be re-offered counsel at stages of the state trial-court proceeding subsequent to his invocation of the right of self-representation and that a failure to do so constituted per se reversible error. He argues that the omission of such an obvious appellate claim runs afoul of Strickland standards.

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[3] Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Rogers fails to show how the decision of the United States Court of Appeals, affirming the United States District Court's denial of habeas relief, is erroneous or, in any way, supports the exercise of this Court's discretionary jurisdiction. He is not entitled to habeas relief on the grounds reasoned in the lower federal courts as well others.[4]

1. The Petition presents no federal question.

As discussed in the ensuing pages, Florida courts have interpreted Florida's Rule 3.111(d) contrary to Rogers' position. Because the Petition's basis, Rule 3.111(d), is a matter of Florida law, which the state's courts have reasonably interpreted, there clearly is no danger that "the federal 'law as determined by the Supreme Court of the United States' might be applied by the federal courts one way in Virginia and another way in California," Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000).

Put another way, especially in light of the facts of this case, the Florida law discussed infra demonstrating that state appellate counsel did not unreasonably omit a Fla.R.Cr.P. 3.111(d) argument, is not "unprincipled or arbitrary,"

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[4] See, e.g., Dandridge v. Williams, 397 U.S. 471, 475 n. 6, 90 S.Ct. 1153, 1156 n. 6, 25 L.Ed.2d 491 (1970) ("prevailing party may, of course, assert in a reviewing court any ground in support of his judgment"); Jaffke v. Dunham, 352 U.S. 280, 77 S.Ct. 307, 308, 1 L.Ed.2d 314 (1957) ("A successful party in the District Court may sustain its judgment on any ground that finds support in the record"); Davis v. Packard, 32 U.S. 276, 282, 32 U.S. 276 (1833) ("question before this court is, whether the judgment was correct, not the ground on which that judgment was given"); Terrell v. University of Texas System Police, 792 F.2d 1360, 1362 n. 3 (5th Cir. 1986), cert. denied, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987) ("When the judgment of the district court is correct, it may be affirmed on appeal for reasons other than those given or relied on below").

"irrational or arbitrary," See Barclay v. Florida, 463 U.S. 939, 947, 103 S.Ct. 3418, 3423, 77 L.Ed.2d 1134 (1983).

There is no federal question here, See § 2254(d)(1), USC (writ may issue only if state-court adjudication "resulted in a decision ... contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States, or ***"); U.S. Const. Art. III § 2, cl. 1 ("*** arising under this Constitution, the Laws of the United States ***"),[5] and certainly not one meriting this Court's discretionary certiorari attention.

2. The claim procedurally fails because it was decided on an "independent and adequate state ground."

Rogers packages his Petition in terms of the applicable **state** law in effect at the time of his state appeal in order to assess the effectiveness of his state appellate counsel under Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, he overlooks that state courts' determinations are fatal to his current claim. The state court determinations constitute "independent and adequate state grounds" barring federal habeas relief. See Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640 (1991) ("independent and adequate state ground doctrine *** applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement"); Griffin v. Wisconsin, 483 U.S. 868, 875-76, 107 S.Ct. 3164, 3169-70, 97 L.Ed.2d 709 (1987) ("regulation, we must take

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[5] Based upon, inter alia, § 2254 and Art. III, the State also disputes Rogers' general assertion (Petition 20 n. 10) that the failure to raise state-procedure-based reversible error in a state appellate court per se violates a federal constitutional right.

that regulation as it has been interpreted by state corrections officials and state courts"; "Wisconsin Supreme Court--the ultimate authority on issues of Wisconsin law"); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 2503-2504, 53 L.Ed.2d 594 (1977). See also, e.g., Lambrix v. Singletary, 520 U.S. 518, 522, 117 S.Ct. 1517, 1522, 137 L.Ed.2d 771 (1997).

In 1995 Rogers filed his state habeas corpus petition in the District Court of Appeals of the State of Florida, Fifth District, and claimed in it, inter alia, that "the trial court never renewed the offer of counsel to Rogers after he initially waived his right to counsel." Relying upon "Florida law," the state petition then argued that this failure to renew the offer of counsel ... constitutes reversible error" (IV tab 13 APP 1324-25) and further contended that counsel's failure to raise reversible error constituted ineffective assistance of appellate counsel. (IV tab 13 APP 1325) The State moved to dismiss the state habeas petition, primarily arguing various state procedural grounds. (IV tab 14 APP 1331 et seq.) Rogers responded to, and disputed, the State's motion to dismiss. (IV tab 15 APP 1373 et seq.) Subsequently, the state appellate court denied the State's motion to dismiss (IV tab 16 APP 1391), and, ultimately, the State filed its Response to Petition for Writ of Habeas Corpus, in which it, inter alia, asserted/re-asserted procedural grounds for denying the petition. The State's Response also opposed the petition on the merits. (IV tab 25 APP 1664 et seq.)

In 1996, the state district court of appeal, without enunciating its reasoning, denied the habeas petition. (IV tab 27 APP 1733) In his purported "facts," Rogers opts for arguing that the state appellate court reached the merits of the claim. (See Petition 10)

Without belaboring which is correct, there are two possible interpretations of the state appellate court's denial of the state habeas petition without opinion: It either denied it based upon **state** procedural grounds or on the merits of **state** law or perhaps on both grounds. In any of these possibilities, the claim is procedurally barred here as based upon an "independent and adequate state ground." See Coleman; Griffin; Sykes.

3. Florida case law subsequent to counsel's alleged ineffectiveness applies to a Strickland analysis.

In affirming the denial of the federal habeas petition, the Eleventh Circuit relied upon several Florida cases decided after the 1984 state direct appeal. The Eleventh Circuit reasoned that they indicate that Florida law does not require per se reversal where the offer of counsel is not explicitly renewed at subsequent stages of the proceedings. Instead, Florida's focus is upon the defendant's understanding of his rights. The gravamen of Rogers' current petition is that the Eleventh Circuit erred in relying upon Florida case law that developed after counsel's alleged ineffectiveness. The Eleventh Circuit decision is not erroneous.

Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 841, 122 L.Ed.2d 180 (1993), is on point. There, a Strickland claim was based upon case law (Collins) as it existed at the time of the alleged ineffectiveness but that had been subsequently overruled to the defendant's detriment. There, the Eighth Circuit affirmed the U.S. District Court's grant of habeas relief holding that the pertinent state court was bound by the law that existed at the time of the alleged ineffectiveness, but this Court reversed the Eighth Circuit. Fretwell indicated that Strickland's prohibition against evaluating trial defense counsel's

performance against hindsight is a protection for counsel.[6] It is not intended as a "windfall" in which a defendant would benefit from an interpretation in the law that is ultimately abrogated. Thus, under Strickland's prejudice prong, "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him," 506 U.S. at 372, 113 S.Ct. at 844, as ultimately determined by case law.

Contrary to Fretwell's holding, Rogers wants a windfall based on his snapshot of the law at the time of the alleged ineffectiveness. Here, as the Eleventh Circuit correctly determined, See discussion infra, a number of Florida cases have been decided that interpret Florida procedural law against Rogers' position arguing that a failure to renew counsel per se constitutes grounds for reversal.

Furthermore, the State respectfully submits that, consistent with Fretwell, common sense and sound judicial economy belie a re-trial or re-sentencing of a defendant where the re-trial or re-sentencing can be lawfully conducted exactly the same way that precipitated a reversal.

4. Florida law holds that its procedural rule requiring renewal of an offer of counsel does not per se require reversal.

As discussed above, Rogers' instant petition argues that Florida's Fifth District Court of Appeal reached the merits of his current claim. Therefore, arguendo, the state court of appeal has interpreted and applied Florida law against Rogers'

---

[6] Accordingly, while counsel's performance is not unconstitutionally deficient for failing to anticipate changes in the law, s/he certainly should not be faulted for correctly anticipating a change.

position. Such a determination of state law is consistent with numerous others rejecting Rogers' per se approach.

Most importantly, in the related murder case against Rogers, the Florida Supreme Court held that the State requirement of renewing the offer of counsel at subsequent stages of the proceedings does not apply where standby counsel is present:

> We find no rule 3.111(d)(5) [Fla. Rule of Criminal Procedure] violation because the court appointed two prominent attorneys as standby counsel who appeared with Rogers at each stage of the proceedings. Rogers is not entitled to habeas relief on this issue.

Rogers v. Singletary, 698 So.2d 1178, 1180 n. 2 (Fla. 1996).[7] Here, standby counsel was appointed, present, and, although not required, even occasionally active. (See I Tab 4 APP 350-51; II tab 2 269-70, 278-82; II tab 4 296, 324, 330-31, 333-34; II Tab 7 APP 768-93; III Tab 8 APP 864-67; III Tab 9 APP 1012; III Tab 10 APP 1130-45)

Rogers, 698 So.2d 1178 (Fla. 1996) is not only binding law in Florida, it reasonably effectuates the purpose of the procedural rule at issue. The obvious purpose of Fla.R.Cr.P. 3.111(d) is to assure that a defendant knows that s/he generally

---

[7] In the Eleventh Circuit, Rogers argued the concurring opinion in Rogers (Fla. 1996. However, Greene v. Massey, 384 So.2d 24, 27 (Fla. 1980), bluntly stated the principle: "A concurring opinion does not constitute the law of the case nor the basis of the ultimate decision unless concurred in by a majority of the Court. *** The special concurring opinion has no precedential value ***." Accord Dunn v. State, 454 So.2d 641, 642 (Fla. 5th Dist. Ct. App. 1984) ("Concurring opinions do not represent precedential authority"). See also, e.g., Marks v. U.S., 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . ..'" quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923, 49 L.Ed.2d 859 (1976); Brown v. State, 719 So.2d 882 (Fla. 1998) (distinguished holdings of prior case from the concurring opinion in it); Santos v. State, 629 So.2d 838, 840 (Fla. 1994) ("Under the Florida Constitution, both a binding decision and a binding precedential opinion are created to the extent that at least four members of the Court have joined in an opinion and decision"; footnotes omitted); Reaves v. State, 485 So.2d 829, 830 (Fla. 1986) (for Florida Supreme Court jurisdiction to review conflicts among district courts of appeal, conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision"; neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction).

Thus, while a concurring opinion might in a future case be persuasive in establishing precedent, it does not constitute precedent as such.

can invoke right to counsel at subsequent stages of the proceeding, such as at sentencing. If the defendant already knows that he can invoke counsel, then the purpose of the rule is satisfied. The presence of standby counsel serves as a reminder of the defendant's ability under Florida law to invoke counsel.

Accordingly, Harrell v. State, 486 So.2d 7, 8 (Fla. 3d Dist. Ct. App. 1986), held shortly after Rogers' direct appeal was resolved against him, See Rogers v. State (IV tab 27 APP 1733) (Fla. 5th Dist. Ct. App. 1985), that the "continuous presence of standby counsel served as a constant reminder to Harrell of his right to counsel." Harrell distinguished Sampson v. State, 466 So.2d 1181 (Fla. 1st Dist. Ct. App. 1985), on which Rogers relies (Petition 19 n. 8):

> In *Sampson v. State*, ... the defendant was not provided with standby counsel. In addition, unlike in *Sampson*, where the defendant was reported to be 'functioning intellectually at the borderline of mental defectiveness,' the record reflects that Harrell is very intelligent and sophisticated in legal matters.

Here, like Harrell, Rogers was very intelligent and relatively sophisticated in legal matters. Further, here Rogers has persisted in representing himself, and after the trials of this cause even boasted about his self-representation.

The trial court noted during the Faretta inquiry:[8]

---

[8] The adequacy of this inquiry was at issue in the Eleventh Circuit, but Rogers has not pursued it here. (See Petition 9 n. 5) Nevertheless, the initial trial court inquiry under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), in this case was part of the trial court proceedings that demonstrated Rogers' ongoing desire to (continued...)

THE COURT: *** I can take judicial notice that you have gone through one trial in this court, and I know also as a matter of fact that you have gone through a trial before Judge Cornelius. So I know you have had at least two trials on the same – on charges of the same nature as the one that is pending here today.

So I agree with Mr. Tabscott that to the extent that one could represent one's self and not be a lawyer, you are probably as capable as anyone might be because of your experience in these cases.

It is my understanding of the law that in order to – that you have the right to represent yourself, and we cannot compel you to have a lawyer. All that needs to be done is for the court to establish that you are knowingly and voluntarily and intelligently requesting to represent yourself. *** I believe you have a high school degree, plus some college education, don't you?

THE DEFENDANT: Yes, sir.

THE COURT: And for the record, though, I would make the finding that not only are you intelligently waiving your right to counsel, but that you also have some background and knowledge in the conduct of the trial and the rules of procedure that would make you something less than a neophyte if you should go to trial.

---

[8](...continued)
represent himself. (See Vol VII Doc 22 pp. 2-9, stamped 241-48; 1 Tab 1APP 2-9).

Rogers not only articulately handled his trials and but also repeatedly re-affirmed his desire to represent himself within this case. For example, he inquired of prospective jurors in the first trial of this case:

> MR. ROGERS: I agree. Does anyone feel uncomfortable with the premise that what we read in the newspaper and see on TV is not necessarily true? Is there anyone here that cannot accept that?
>
> ***
>
> MR. ROGERS: You believe that you can sit and listen and – Now, we're getting to a very important question here for the jury. The judicial system, the American judicial system is based on the premise of the presumption of innocence. You are presumed innocent until proven guilty.
>
> Now, if there is anyone here who thinks that because a person had charges filed against him or has been indicted or has an information filed, as in this case, that that person is guilty and it's up to him to prove his innocence, it is your duty now at this time to honestly come forward and say that's the way you feel. If you do not believe that as I stand here before you today, right now at this minute, that I am absolutely innocent, because no evidence has been presented, I'd like for you now to step forward, raise your hand.
>
> ***
>
> MR. ROGERS: I would backstrike number four.
>
> ***

MR. ROGERS: Your Honor, I would challenge number nineteen for cause. The lady works at the very same store that I am accused of having robbed. Although she admits that she doesn't remember the people right now, she may later, is what I'm worried about. These people are still working at that grocery store, and I'm sure that somewhere along the course of the trial, that's going to dawn on her.

[Trial court granted Rogers' challenge]

(I tab 2 APP 71, 77, 93, 94-95)

Rogers moved for mistrial (I tab 2 APP 214-15) and ultimately obtained a mistrial in the first trial of this case (I tab 2 APP 267-68).

After the mistrial, at the beginning of voir dire of the second trial in this case, at which Rogers was ultimately convicted, the trial court expressly asked Rogers, "Are you representing yourself? You are Mr. Rogers?," to which Rogers replied, "Yes, sir, Your Honor. I am representing myself." (I tab 4 APP 296)

In the second trial's voir dire, Rogers played to the sympathy of the jury while re-affirming his desire to represent himself:

Let me introduce myself first. In case you've forgotten, I'm Jerry Rogers. I'm the defendant in this case.

Voir dire is very important to me because this is the only opportunity I'll have to get to find out a little

bit about you people. And some of you are going to sit in judgment in here on me in this case.

I'm nervous, there's no doubt about that. You probably noticed that. I'm not very good at this. This is not my profession. By profession I'm a cabinet maker. I've chosen to represent myself in this case because I felt like I would have a better opportunity to do a better job than the people I would have had appointed to me. And I say appointed, because I was without funds, I was declared indigent in this case. And that meant I would have been appointed a Public Defender or an outside attorney. As it turned out, I was appointed an outside attorney. And I felt like the caseload that were on these people, type of people, is too great for them to put the time involved in such a case as this.

(II Tab 5 APP 421-22)

On November 5, 1983, while discussing jury instructions, Rogers corrected the trial judge regarding the possible sentences, while standby counsel's participation reminded Rogers' of counsel's continued availability:

THE COURT: Well, it's five for a third degree felony. Do you want the fine in there?

MR. TABSCOTT [standby counsel]: Do you want the fine?

MR. ROGERS: No, Your Honor.

THE COURT: Let's just tell them it's life imprisonment or probation for any period of years up to life. That's the minimum.

MR. ROGERS: Your Honor, --

MR. COCCHIARELLA: Say that again, please.

MR. ROGERS: I think the minimum is three because this is an armed robbery on each case.

(III Tab 10 APP 1134)

Rogers demonstrated his knowledge of his ability to re-invoke counsel when, a moment after being sentenced, **he initiated** the appointment of the public defender for the purpose of appeal:

MR. ROGERS: I have an affidavit of insolvency for purposes of appeal here, the original and a copy.

THE COURT: You got one there?

MR. ROGERS: The original and a copy for you. I ask that the public defender be appointed to cover my appeal.

(III tab 12 1298)

In a 1984 letter, soon after the second trial, in which the conviction is at issue here, Rogers went well beyond re-affirming his self-representation by boasting about it. He indicated that he had "represented himself on 4 cases so far," "demonstrated [his] capabilities," and achieved favorable dispositions on a number of them. (VII "Exhibit" C-1 to C-4)

In contrast to the abundant indicia, in the spirit of the Florida renewed-offer-of-counsel rule of procedure, that Rogers chose self-representation and continued to desire it with eyes wide open, Rogers (Petition 22) singles out one excerpt in the second trial (at II tab 7 APP 788) from which he now infers that "the trial court essentially told Rogers that he had made his decision and was stuck with it ***." However, the context of the trial court's comment was Rogers' logistical difficulty in securing tangible evidence and Rogers' pro se request for a mistrial on that basis. (See II tab 7 APP773-90) Therefore, the trial court commented and queried during the argument over Rogers' difficulties obtaining evidence and motion for mistrial:

> Well, what am I supposed to do about it? You know here we are in the fourth day of trial. And the jury is sworn. They're sitting out there waiting to hear some more evidence.
>
> ***
>
> Isn't it ordinarily the responsibility of the persons involved in the case to have their evidence under control at the time the case begins so they can proceed? I would think so. It's not my responsibility to do those things.

(II tab 7 APP 775) Further, the ellipsis in the quote (Petition 22) reflects omitted material that clarify that the discussion focused upon Rogers' motion for mistrial based upon his difficulty obtaining evidence. For example, immediately after stating "You take your choice, I guess," the trial court continued:

> I would try to think what happens if the Public Defender puts itself in a situation like this and doesn't

> have a witness subpoenaed or doesn't have evidence available. And well, we try to work with them and resolve it any way we can. But if they don't have the evidence there - [standby counsel interrupted the trial judge]

(II tab 7 APP 788-89) The following exchange between standby counsel and the trial court lead into the last part of the Petition's block quote:

> MR. TABSCOTT [standby counsel]: I don't know what else to do that hasn't already been done. You know, other than grant the mistrial and start all over again.
>
> THE COURT: Well, I don't see why we grant a mistrial. I mean, Mr. Rogers has undertaken to represent himself. And he goes by the same rules. I'll deny the motion for mistrial. Are you ready with the witnesses.
>
> MR. TABSCOTT: Judge this is something that could have happened to me or Mr. Cocciarella [the prosecutor].
>
> THE COURT: It didn't. I'm denying the motion.
>
> ***

(II tab 7 APP 790) Moreover, even here, standby counsel's role reminded Rogers of counsel's availability.

In sum, as reflected in the facts of this case, the current law in Florida reasonably interprets Fla.R.Cr.P. 3.111(d) so that it does not provide a windfall to defendants on the basis of a

failure of a trial to utter "magic words." There is no per se rule in which such a failure constitutes grounds for a new trial or new sentencing. See also cases cited by Eleventh Circuit (Petition A13-14).

In contrast to the majority opinion of the highest Florida state court on a matter of state law in Rogers (Fla. 1996) and in contrast to Harrell and other cases the Eleventh Circuit cites, the Petition (at pp. 16-18) summarizes nine cases that, even on the face of the Petition's argument, do not control or otherwise entitle Rogers to a new trial. The most noteworthy aspect of the Petition's discussion of all but three of these nine cases is that they concern the sentence as a separate stage of the proceedings, and even concerning sentencing, Rogers does not show how they establish a per se rule that totally ignores the purpose of Rule 3.111(d). Thus, erroneously interpreting those cases as controlling, they would only afford Rogers a new sentencing, not a new trial.

The three cases that Rogers argues (Petition 17) required a new trial are Clark v. State, 442 So.2d 1044 (Fla. 4th Dist. Ct. App. 1983), Tucker v. State, 440 So.2d 60 (Fla. 1st Dist. Ct App. 1983) , and Felton v. State, 438 So.2d 1049 (Fla. 3d Dist. Ct App. 1983). None of them demonstrate that appellate counsel was unreasonable for failing to base a state claim upon them.

In Clark, Florida's Fourth District Court of Appeal held that the trial court's Faretta inquiry was inadequate and "[m]oreover" held that the renewal requirement of Fla.R.Cr.P. 3.111(d) was not "fulfilled." It did not hold that all technical violations of the rule per se require reversal, and it did not address the situation here, where the purpose of the rule was satisfied.

In Tucker, Florida's First District Court of Appeal, like Clark, held that the Faretta inquiry was inadequate, thereby requiring a new trial, and addressed the applicability of Rule 3.111(d) only concerning the sentencing phase, without discussing whether any standby counsel would affect the inquiry.

Felton, like Clark and Tucker, did not discuss standby counsel or other indicia that the defendant understood his right to invoke counsel later in the proceedings. It therefore does not establish that appellate counsel was unreasonable for failing to argue it.

Therefore, concerning a new trial, the Petition asserts that state appellate counsel should have based a separate claim upon Felton and Clark, but neither control the facts of the instant case. Further, neither were decided by Florida's Fifth District Court of Appeal, the appellate court reviewing the direct appeal, and therefore neither were controlling precedent for the Fifth District, Cf Virginia Ins. Reciprocal v. Walker, 765 So.2d 229, 233 (Fla. 1st DCA 2000) ("the [Fourth District's] decision does not have the same binding effect in this court"); Durham v. Palm Court, Inc., 558 So.2d 59, 60 (Fla. 4th DCA 1990) ("we are not bound by" the First District's decision).

Only one of the nine cases Rogers discusses was decided by the Florida Supreme Court. Rogers argues (Petition 18) that State v. Sanderson, 469 So.2d 1383 (Fla. 1985), affirmed the portion of Sanderson v. State, 447 So.2d 374 (Fla. 1st DCA 1984), that vacated the defendant's sentence "for failure to renew offer for counsel." The State notes that Sanderson, if pertinent at all here, concerned only sentencing and it did not address whether Rule 3.111(d) can be satisfied under the totality of the facts of a case, the situation here.

Moreover, the State disputes Rogers' interpretation of the Florida Supreme Court's Sanderson opinion. It did not address the renewal of counsel issue there. The following is the Florida Supreme Court opinion, in its entirety:

> We accepted jurisdiction in *Sanderson v. State*, 447 So.2d 374 (Fla. 1st DCA 1984), because a portion of that decision conflicts with *Hicks v. State*, 452 So.2d 606 (Fla. 4th DCA 1984). We have approved *Hicks*, --- So.2d ---- No. 65,495 (Fla. May 23, 1985), and therefore quash the portion of Sanderson holding that a probationer is not entitled to appointed counsel at a probation revocation hearing. We approve the court's finding an insufficient waiver of counsel by Sanderson.
>
> The decision of the district court is therefore quashed in part, and approved in part, and remanded for further consideration in light of our approval of *Hicks*.
>
> It is so ordered.

469 So.2d at 1384. The Florida Supreme Court's approval of the portion of First District's opinion "finding an insufficient waiver of counsel by Sanderson" concerned the adequacy of the waiver not the procedural renewal of offer of counsel. See Sanderson, 447 So.2d at 376 (Fla. 1st Dist. Ct. App. 1984) ("If the appellant were entitled to appointed counsel at his revocation hearing, we would be constrained to reverse the order revoking probation because of the insufficiency of the trial court's inquiry regarding self-representation").

Moreover, except for Sanderson, and to the degree that they are at all pertinent, Florida district court of appeals decided

all of the cases Rogers discusses (Petition 16-18), and, if they somehow stand for per se reversal, they have been superseded by the Florida Supreme Court cases such as Rogers (Fla. 1996) and others upon which the Eleventh Circuit relied.[9]

In conclusion, Rogers' Petition presents arguments in which he hindsightedly second-guesses state appellate counsel, but, given the absence of controlling authority at the time of the 1984 appeal and the totality of the facts of this case, they do not rise to the Strickland level that any reasonable appellate counsel would have made them. And, given the authorities that have developed subsequent to the state direct appeal, under Fretwell, he has shown no prejudice.

5. The underlying federal petition for writ of habeas corpus was untimely.

The State argued in the U.S. District Court and in its Eleventh Circuit brief that this cause is barred by laches. Its Eleventh Circuit brief also cited to the one-year statute of limitation of 28 USCA § 2244. The State argued, and re-asserts now, that "nearly 11 years elapsed while Rogers 'sat on' his purportedly violated right to effective assistance of appellate counsel." It continues to contend that potentially significant transcripts of pertinent pre-trial hearings may have been lost due to Rogers' delay (See IV tab 14 p. 1611-15).[10]

---

[9] See Hoffman v. Jones, 280 So.2d 431, 440 (Fla. 1973) ("hold that a District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida"); Continental Assur. Co. v. Carroll, 485 So.2d 406, 409 (Fla. 1986) ("no district court can legitimately circumvent a decision of this Court").

[10] Rogers' Eleventh Circuit Reply Brief contended that the State did not establish that there are any missing transcripts, that the State (continued...)

CONCLUSION

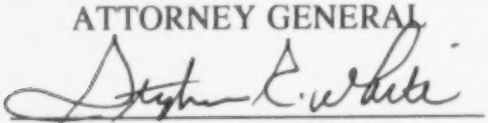
Based on the foregoing discussion, the State of Florida respectfully requests this Honorable Court deny the Petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

I certify that three copies hereof have been furnished to John Buchanan, III, Esq.,Timothy C. Hester, Esq., Mark E. Podara, Esq., Covington & Burling, 1201 Pennsylvania Ave., N.W., Washington, D.C. 20004-2401, by MAIL on March 29, 2001.

Respectfully submitted and served,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



STEPHEN R. WHITE *
Assistant Attorney General
Florida Bar No. 159089

Attorney for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext 4579

COUNSEL FOR RESPONDENT
*COUNSEL OF RECORD

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[10](...continued)
failed to meet the requirements of Habeas Corpus Rule 9(a), and that the federal habeas petition was "timely under U.S.C. § 2244(d)."

Supreme Court, U.S.
FILED
APR 12 2001
OFFICE OF THE CLERK

NO. 00-1349

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY LAYNE ROGERS, SR.,
Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections, State of Florida,

BRADLEY D. CARTER,
Warden, Union Correctional Institution, Raiford, Florida,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jerrel E. Phillips
P.O. Box 14463
Tallahassee, FL 32317
(850) 877-8660

John G. Buchanan III
Timothy C. Hester*
Mark E. Porada
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000
* Counsel of Record
Attorneys for Petitioner

April 12, 2001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. THE PETITION PRESENTS A FEDERAL QUESTION. 1

II. ROGERS'S CLAIM IS NOT PROCEDURALLY DEFAULTED. 2

III. SUBSEQUENT FLORIDA CASE LAW HAS NOT ABROGATED THE REQUIREMENT TO RENEW THE OFFER OF COUNSEL UNDER FLA. R. CRIM. P. 3.111. 4

A. Counsel's Performance Must Be Assessed Under the Prevailing Case Law at the Time of Appeal..... 4

B. The Involvement of Standby Counsel Does Not Excuse Counsel's Failure to Raise this Claim on Appeal 5

C. The Case Law Subsequent to Rogers's Appeal Does Not Overcome or Eliminate the Prejudice from Counsel's Failure to Raise this Claim. 6

IV. ROGERS'S FEDERAL HABEAS CORPUS PETITION WAS TIMELY. 10

TABLE OF AUTHORITIES

Federal Cases

Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991) ..1
Chateloin v. Singletary, 89 F.3d 749 (11th Cir. 1996) 1
Coleman v. Thompson, 501 U.S. 722 (1991) 3
Evitts v. Lucey, 469 U.S. 387 (1985) 1
Lockhart v. Fretwell, 506 U.S. 364 (1993).....4, 7
Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976).....5
Mayo v. Henderson, 13 F.3d 528 (2d Cir. 1994).....1
Newsted v. Gibson, 158 F.3d 1085 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1509 (1999) 1
United States v. Taylor, 933 F.2d 307 (5th Cir. 1991).....5

State Cases

Beard v. State, 751 So. 2d 61 (Fla. Dist. Ct. App. 1999) 9
Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992).....3
Byrd v. Singletary, 655 So. 2d 67 (Fla. 1995) 3
Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996) 8
Groover v. Singletary, 656 So. 2d 424 (Fla. 1995) 3
Knight v. State, 394 So. 2d 997 (Fla. 1981).....2
Norman v. State, 699 So. 2d 854 (Fla. Dist. Ct. App. 1997) 9
Payne v. State, 642 So. 2d 111 (Fla. Dist. Ct. App. 1994).....6
Pulmosan Safety Equipment Corp. v. Barnes, 752 So. 2d 556 (Fla. 2000).....8
Rogers v. Singletary, 698 So. 2d 1178 (Fla. 1996).....7, 8, 9
Smith v. State, 400 So. 2d 956 (Fla. 1981) 2
State v. Frye, 617 A.2d 1382 (Conn. 1992) 5
State v. Roberts, 677 So. 2d 264 (Fla. 1996).....9

Statutes

28 U.S.C. § 2244 10

Rules

Fla. R. Crim. P. 3.111 .....2, 4, 5, 7
Fla. R. Crim. P. 3.850 .....2, 3

ARGUMENT

I. THE PETITION PRESENTS A FEDERAL QUESTION.

The State argues in its opposition that Rogers's Petition "is a matter of Florida law," and therefore "[t]here is no federal question here." (State Br. at 6-7.) But Rogers is not raising a state law claim. Rather, the claim is that Rogers was denied his federal right to the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments, because his lawyer failed to raise a claim of reversible error under state law on direct appeal.

A defendant may be deprived of his federal constitutional right to the effective assistance of counsel when a lawyer fails to object to violations of state law or to raise meritorious state law claims on direct appeal. Numerous cases confirm this proposition. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 389-90 (1985) (finding counsel constitutionally ineffective for failing to comply with state procedural rules on direct appeal).[1]

---

[1] The appellate claim "whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim." *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994). *See also Newsted v. Gibson*, 158 F.3d 1085, 1093 n.6 (10th Cir. 1998) (state law claim "appropriately raised in this habeas petition because it arises in the context of a claim of ineffective assistance of appellate counsel"), *cert. denied*, 119 S. Ct. 1509 (1999); *Chateloin v. Singletary*, 89 F.3d 749, 754 (11th Cir. 1996) (analyzing the merits of state law claim, to determine whether appellate counsel was constitutionally deficient for failing to raise that claim on direct appeal); *Atkins v. Attorney General*, 932 F.2d 1430, 1432 (11th Cir. 1991) (analyzing state evidentiary rules and finding counsel constitutionally deficient for failing to raise an objection under state law).

An appellate lawyer's failure to spot a reversible error of state law is no less ineffective assistance than the failure to spot a federal law issue. It is the ineffective assistance, not the particular source of legal error, that deprives the defendant of rights guaranteed under the Sixth and Fourteenth Amendments. Here, Rogers was denied his federal right to the effective assistance of counsel because his lawyer failed to raise an obvious claim of reversible error under state law -- the trial court's violation of Fla. R. Crim. P. 3.111.

II. ROGERS'S CLAIM IS NOT PROCEDURALLY DEFAULTED.

The State argues again, as it has several times below, that Rogers's federal habeas corpus petition is procedurally barred because the Florida District Court of Appeal that rejected Rogers's state habeas corpus petition might have based its decision on state procedural rules. In fact, the Florida court denied the State's motion to dismiss Rogers's petition as untimely under state law. Therefore, the state court's subsequent ruling necessarily was a decision on the merits of the claim.

The State also argued before the Florida court that the statute of limitations for post-conviction motions brought under Fla. R. Crim. P. 3.850 should have barred Rogers's claims of ineffective assistance of appellate counsel raised in a state habeas corpus petition. However, under longstanding Florida law, claims of ineffective assistance of appellate counsel must be raised through an original petition for writ of habeas corpus filed in the state court that heard the direct appeal. *See Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981); *Knight v. State*, 394 So. 2d 997, 999 (Fla. 1981). Accordingly, the two-year limitations period provided in

Fla. R. Crim. P. 3.850 had no bearing on Rogers's claims of ineffective assistance of appellate counsel.[2]

That background explains why the Florida District Court of Appeal denied the State's motion to dismiss Rogers's habeas corpus petition as untimely or procedurally barred. The court's subsequent denial of Rogers's habeas corpus petition was necessarily a decision on the merits, because the court had already denied the State's motion to dismiss the petition as untimely. The Eleventh Circuit expressly rejected the State's argument for procedural default below, stating that "we must assume that the state appellate court considered the petition on the merits since it did not clearly and expressly rely on an independent and adequate state procedural ground to dismiss the petition." (App. A10.) *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 735 (1991) (federal review is not procedurally barred if "the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims . . . and did not 'clearly and expressly' rely on [procedural default]").

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[2] Florida courts have routinely decided the merits of original state habeas corpus petitions filed years after expiration of the two-year period of Fla. R. Crim. P. 3.850. *E.g., Groover v. Singletary*, 656 So. 2d 424, 424-25 (Fla. 1995) (deciding merits of habeas petition filed ten years after ruling on direct appeal, and nine years after the filing of Rule 3.850 motion); *Byrd v. Singletary*, 655 So. 2d 67, 67-68 (Fla. 1995) (deciding merits of habeas petition filed nine years after the decision on direct appeal, and seven years after the filing of a Rule 3.850 motion); *Breedlove v. Singletary*, 595 So. 2d 8, 8-10 (Fla. 1992) (deciding merits of habeas petition filed ten years after the decision on direct appeal and ten years after the filing of a Rule 3.850 motion).

III. SUBSEQUENT FLORIDA CASE LAW HAS NOT ABROGATED THE REQUIREMENT TO RENEW THE OFFER OF COUNSEL UNDER FLA. R. CRIM. P. 3.111.

A. Counsel's Performance Must Be Assessed Under the Prevailing Case Law at the Time of Appeal

The Eleventh Circuit was required to assess counsel's performance by the legal standards in effect at the time of counsel's actions. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (emphasis added). "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct . . . viewed as of the time of counsel's conduct." *Id.* at 690 (emphasis added).

The State argues that this Court's holding in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), justifies the Eleventh Circuit's reliance on Florida case law decided after Rogers's direct appeal in assessing counsel's performance. In fact, this Court expressly held in *Lockhart* that it was "necessary" to judge counsel's effectiveness by the legal standards in effect as of the time of counsel's actions, and stated that the Court had "adopted the rule of contemporary assessment of counsel's conduct" under *Strickland*. *Id.* at 371-72. The Eleventh Circuit clearly erred in judging Rogers's counsel's performance by the standards of cases decided years after the time of Rogers's direct appeal.

As set forth in Rogers's Petition, numerous cases, rendered months or even years before the time of Rogers's direct appeal, had held that the failure of a trial court to renew the offer of counsel under Fla. R. Crim. P. 3.111 required reversal. Not a single reported Florida

decision as of that time had held otherwise. (Rogers Br. at 14-20.) The State (Br. at 21-22) attempts to distinguish certain cases on the basis that they only involved reversals of sentences, not convictions. But in those cases the trial court failed to renew the offer of counsel at sentencing. In this case, in contrast, the trial court also failed to renew the offer of counsel during the critical pre-trial and trial phases, so that reversal of Rogers's conviction would have been required if the claim had been raised on direct appeal. *See* Rogers Br. at 14-20.

B. The Involvement of Standby Counsel Does Not Excuse Counsel's Failure to Raise this Claim on Appeal

The State speculates that Florida courts would have reached a different result on Rogers's appeal -- contrary to every case decided by that time -- because Rogers had standby counsel. But the law is clear that standby counsel do not serve as counsel and do not fulfill the Sixth Amendment entitlement to counsel.[3] And Fla. R. Crim. P. 3.111 is explicit that the offer of counsel must be

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[3] *See United States v. Taylor*, 933 F.2d 307, 312 (5th Cir. 1991) ("Given the limited role that a standby attorney plays, we think it clear that the assistance of standby counsel, no matter how useful to the court or the defendant, cannot qualify as the assistance of counsel required by the Sixth Amendment."); *Maynard v. Meachum*, 545 F.2d 273, 277 (1st Cir. 1976) ("whatever label is attached" to standby counsel, "the net result" is that the defendant "had less than the full representation by counsel to which, absent a valid waiver, he was entitled"); *State v. Frye*, 617 A.2d 1382, 1385 (Conn. 1992) ("[b]y taking charge, the defendant has forfeited the right to have an attorney make the critical strategic and tactical decisions pertaining to the defense, and has thus waived the right to counsel," whether or not standby counsel is available) (quotation omitted).

renewed at each stage of trial when the defendant appears without counsel.

Here, Rogers appeared without counsel at each stage of the trial. The presence of standby counsel – who did not serve as his counsel[4] – thus could not satisfy this specific requirement of Florida procedure. Reflecting this point, Florida courts have held that the presence of uninvolved standby counsel does not alter the requirements of Fla. R. Crim. P. 3.111. *See, e.g., Payne v. State*, 642 So. 2d 111, 112 (Fla. Dist. Ct. App. 1994). Given that unbroken line of precedent, it was inexcusable for counsel to fail to raise this argument on Rogers's behalf.

C. The Case Law Subsequent to Rogers's Appeal Does Not Overcome or Eliminate the Prejudice from Counsel's Failure to Raise this Claim.

The State argues that Florida cases decided after the time of Rogers's direct appeal support the Eleventh Circuit's conclusion that Fla. R. Crim. P. 3.111 does not universally require reversal for failure to renew the offer of counsel. Under *Lockhart v. Fretwell*, a subsequent change in case law can bear on the prejudice prong of a *Strickland* claim to the extent that the change limits or abrogates the claim that counsel unreasonably failed to raise. The prejudice prong "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." 506 U.S. at 372. If a subsequent development in the law no longer recognizes the right that counsel failed to raise, then "unfairness does not result." *Id.*

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[4] Rogers conducted the entire defense, while standby counsel functioned solely in an advisory capacity. *See* Rogers Br. at 7.

The Eleventh Circuit did not rely on subsequent case law to assess whether Rogers had been prejudiced by counsel's deficient performance. Rather, it looked to subsequent case law to conclude that counsel's performance had not been deficient. This was clearly contrary to the "rule of contemporary assessment of counsel's conduct" established in *Strickland* and reiterated in *Lockhart v. Fretwell*, 506 U. S. at 371-72.

In any event, the subsequent case law does not eliminate the prejudice from counsel's failure to raise a claim under Fla. R. Crim. P. 3.111 on direct appeal. Although some subsequent Florida decisions have found narrow exceptions to the absolute requirement of reversal for failure to renew the offer of counsel, those exceptions do not apply to the facts of this case. Even today, the failure to renew the offer of counsel, on the facts presented here, is reversible error under Florida law. Thus, unlike *Lockhart v. Fretwell*, here counsel's performance was both unreasonable and prejudicial even if viewed in light of subsequent case law.

In particular, the State relies on *Rogers v. Singletary*, 698 So. 2d 1178 (Fla. 1996) (State Br. at 11-13), a state habeas corpus proceeding following Rogers's conviction and death sentence in St. John's County.[5] In that case, Rogers argued that his appellate counsel was ineffective for failing to argue on direct appeal that the trial court violated Fla. R. Crim. P. 3.111 by not renewing the offer of counsel to Rogers in his murder prosecution (where he represented himself *pro se*). The Florida Supreme Court rejected that claim, and found no violation of Fla. R. Crim. P. 3.111, because the trial court had "appointed two prominent

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[5] The Florida Supreme Court has recently reversed Rogers's 1984 murder conviction based on evidence that the State improperly withheld from the defense. *Rogers v. State*, Case No. 91,044 (Fla. Feb. 15, 2001).

attorneys as standby counsel who appeared with Rogers at each stage of the proceedings." *Id.* at 1180 n.2.

The concurring judge specifically noted "the unusual circumstances" presented by the facts of that case. *Id.* at 1181 (Anstead, J., concurring).[6] Most notably, the two lawyers who were appointed to represent Rogers in that trial were not "uninvolved 'standby' counsel, but rather [were] active and responsible co-counsel." *Id.* at 1181-82. When appointed, the lawyers stated on the record that they would not be merely "assisting" Rogers but would be "participating" in the defense. *Id.* at 1181 n.3. "Indeed, the entire penalty phase of the trial was conducted by the lawyers appointed to represent petitioner." *Id.* Thus, "[s]ince the trial court had actually provided the defendant with counsel, the court could hardly be expected to remind the defendant that he had a right to have counsel appointed for the penalty phase of his trial. Further, since counsel . . . conducted the entire penalty phase, petitioner would be hard pressed to demonstrate prejudice about not being informed of his right to the assistance of counsel in the penalty phase." *Id.* at 1182. (emphasis added).

Here, the trial court expressly limited appointed counsel's role to an "advisory capacity," and directed that counsel "would not be responsible for the

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[6] The State argues that this Court should disregard the concurring opinion in *Rogers v. Singletary* because the concurrence was not the law of the case. Although the concurring opinion is not itself binding authority, it can be cited and relied upon to help explain the facts or reasoning of the court's opinion. *See Pulmosan Safety Equipment Corp. v. Barnes*, 752 So. 2d 556, 557-58 (Fla. 2000); *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 406 (Fla. 1996); *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck*, 576 So. 2d 261, 262 (Fla. 1990); Kogan & Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L. Rev. 1151, 1172-73 (1994).

conduct of the trial." Rogers himself conducted the entire trial, from beginning to end. Appointed counsel did not question a single witness, give opening or closing arguments, conduct voir dire, or in any other way assume a role in the trial.

This case is therefore totally unlike *Rogers v. Singletary*. Where counsel has been "actually provided," as in *Rogers v. Singletary*, renewal of the offer of counsel is not required. Here, Rogers was not represented by counsel. Therefore, the explicit requirements of Fla. R. Crim. P. 3.111(d) -- applicable "at each subsequent stage of the proceedings at which the defendant appears without counsel" -- required renewal of the offer of counsel.

The Florida courts have specifically noted the limited scope of the exceptions to the mandatory requirement of Fla. R. Crim. P. 3.111 and have restricted those exceptions to situations where (a) the defendant used his waiver of counsel to disrupt the proceedings or (b) where standby counsel actually engaged in a substantive role at trial. In *State v. Roberts*, 677 So. 2d 264 (Fla. 1996), the court stated that "under normal circumstances, rule 3.111(d)(5) requires a trial court to advise a *pro se* defendant of the right to counsel at each subsequent stage of trial." *Id.* at 265. The court declined to reverse only because an application of the rule to the facts of that case would have led to an "absurd result" and would have permitted the defendant to "abuse the dignity of the court or to frustrate orderly proceedings," *id.* at 266, because the defendant had displayed a pattern of disrupting the trial by repeatedly changing positions as to whether he wanted counsel or wanted to proceed *pro se*. *See also Norman v. State*, 699 So. 2d 854, 854 (Fla. Dist. Ct. App. 1997); *Beard v. State*, 751 So. 2d 61, 62 (Fla. Dist. Ct. App. 1999).

Here, the State has conceded that Rogers did not disrupt the proceedings. And standby counsel was appointed in an "advisory" capacity only, and served no role in Rogers's trial. Therefore, even under current Florida

law, Rogers would be entitled to reversal based on the trial court's failure to renew the offer of counsel. Except where these narrow exceptions are established, Florida cases decided after the time of Rogers's appeal have consistently reversed convictions or sentences because of the failure to renew the offer of counsel to a *pro se* defendant. *See* Rogers Br. at 18 n. 8.

IV. ROGERS'S FEDERAL HABEAS CORPUS PETITION WAS TIMELY.

The State argues that Rogers's federal habeas corpus petition was untimely under the one-year statute of limitations imposed by 28 U.S.C. § 2244. Rogers's claim of ineffective assistance of appellate counsel was timely filed in state court on November 6, 1995. Accordingly, the federal habeas corpus statute of limitations was tolled from April 1996 (when it went into effect) through August 28, 1996, when the petition was denied by the Florida Fifth District Court of Appeal. Rogers's federal habeas corpus petition, filed less than one year later, on August 24, 1997, therefore was timely under 28 U.S.C. § 2244(d).

The State also inserts a one-sentence argument that "potentially significant transcripts of pertinent pre-trial hearings may have been lost due to Rogers's delay" in filing his state habeas corpus petition. (State's Br. at 24.) This argument has been raised and rejected by every court below. In any event, the existence of any additional pre-trial transcripts would have no bearing on Rogers's claim here -- that the trial court failed to renew the offer of counsel after Rogers waived his right to counsel at the start of trial.

CONCLUSION

For the foregoing reasons, as well as those set forth in Rogers's Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

Jerrel E. Phillips
P.O. Box 14463
Tallahassee, FL 32317
(850) 877-8660

John G. Buchanan III
Timothy C. Hester*
Mark E. Porada
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

* Counsel of Record
Attorneys for Petitioner

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